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(2) ORIGINAL

NUMBER 85-5446

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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

* * * * * * * * * * * * * * * * * * *

OCTOBER TERM, 1985

* * * * * * * * * * * *

BENJAMIN A. BERRY,
PETITIONER

VERSUS

JOHN T. KING, SECRETARY OF THE LOUISIANA DEPARTMENT OF CORRECTIONS, AND, THE HONORABLE WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
RESPONDENTS

* *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* *

ORIGINAL APPLICATION FOR CERTIORARI ON
BEHALF OF PETITIONER, BENJAMIN A. BERRY

A DEATH PENALTY MATTER!

* * * * * * * * * * * * * * * * *

SAMUEL S. DALTON
ATTORNEY AT LAW
2001 Jefferson Highway
Jefferson, Louisiana 70121
(504) 835-4289

ATTORNEY FOR PETITIONER
Benjamin A. Berry

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SUPREME COURT, U.S.

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QUESTIONS PRESENTED

(1) Did the petitioner deprived of effective assistance of counsel, in violation of the Sixth Amendment, when he was represented by a self admitted Drug Addict, on probation from the State of Florida for Felony possession of cocaine, who, without petitioner's informed consent and/or intelligent waiver, proceeded to:

a) Admit petitioner's guilt in opening argument to the jury; and,

b) During the State's case, in chief, entered into evidence the following stipulated facts in the sequence listed, to-wit:

1) That the defendant went to the Metairie Bank on the morning of 1-30-78 with the intent of committing armed robbery.

2) That after entering the Bank the defendant fired three shots, two of which struck and killed Dep.Robert Cochran.

3) That Dep.Cochran did fire one shot with service revolver which shot struck the defendant.

4) A spent pellet was removed from the defendant and if Tech. Ron Singer would testify he would testify that the pellet recovered from the defendant was fired by Dep. Cochran's service revolver.

5) That the detective recovered a spent 9mm pellet from the defendant's home in Baton Rouge and Tech. Singer would testify that this pellet was fired by the same pistol which fired the pellets recovered from Deputy Cochran's body.

(See Appendix "I", page 100 ,hereof).

Further did the foregoing stipulations amount to the Functional Equivalent of a Guilty Plea depriving petitioner of all the Constitutional rights and protections created by his plea of "Not Guilty"?

(2) Whether the failure of the trial attorney to investigate and prepare for the sentencing phase of a bifurcated capital trial violates the right to effective assistance of counsel at that critical stage of the adversary process when said inadequate investigation and preparation resulted in the inability of trial counsel to present even one witness in support of the only

plausible mitigating factor available under the circumstances, despite the existence and availability of some evidence, albeit "equivocal" or ambiguous, tending to support the notion that the victim--rather than the accused--had initiated the exchange of gunfire; and further, whether said inaction was compounded by: (a) ill-advised conduct which conveyed the impression to the jury that petitioner's own mother was unwilling to testify in order to attempt to spare thelife of her son; and, (b) a tepid and lackluster closing argument in which counsel failed to ask the jury to spare the life of petitioner and virtually destroyed his client's otherwise plausible contention that the victim had initiated the gunfire?

(3) Whether the exclusion of so-called "Witherspoon Excludables" from petitioner's petit jury violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution to an impartial jury selected from a fair and representative cross section of his community at the guilt stage of his capital trial; said underrepresentation of a distinct group in society, thereby constituting a conviction prone jury.

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NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BENJAMIN A. BERRY

VS.

JOHN T. KING, SECRETARY OF THE
DEPARTMENT OF CORRECTIONS, ET AL

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petition of Benjamin A. Berry respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on July 1, 1985, rehearing denied on August 13, 1985.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, concerned herein is cited as ___ F.2d _____, unreported as of the time of filing this petition, bearing Docket No: 85-3043, appended hereto as Appendix "A", pages 27-39 hereof and the denial of rehearing thereon dated August 13, 1985 is appended hereto as Appendix "B", page 41 hereof. The Stay of the Fifth Circuit Court of Appeals mandate, dated September 5, 1985, is appended hereto as Appendix "C", page 43 hereof.

OTHER RELEVANT ACTIONS
AND OPINIONS BELOW

1) Judgment and Order of the United States District Court for the Eastern District of Louisiana dated January 2, 1985 (See Appendix "D", pages 45-46 hereof).

2) Findings and Recommendation of United States Magistrate dated October 26, 1984 (See Appendix "E", pages 48-67 , hereof).

3) Louisiana Supreme Court decision affirming Statection Application for Habeas Corpus dated 4th day of April, 1983 reported in 430 So.2d 1005 (La.1983). (See Appendix "F", pages 69-79 , hereof).

4) Decision of Louisiana Supreme Court, dated September 4, 1980 affirming petitioner's original conviction and sentence reported in 391 So.2d 406. (See Appendix "G", pages 81-96 hereof).

5) Denial of Writ of Certiorari to the Louisiana Supreme Court to review its affirmance of petitioner's original conviction and sentence. Justice Stewart would grant certiorari, reported in 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (19811). (See Appendix "H", page 91 hereof).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on July 1, 1985. (See Appendix "A", page 27, hereof). A timely petition for rehearing was filed and was denied August 13, 1985 (See Appendix "B", page 41 hereof). The Honorable Fifth Circuit stayed its mandate until September 20, 1985 pending application to this Honorable Court for Certiorari (See Appendix "C", page 43, hereof).

The petition for certiorari to United States Court of Appeals for the Fifth Circuit is filed herein within ninety (90) days of the entry of Judgment, concerned herein, and, in order to preserve the stay of mandate, (See Appendix "C", page 43 hereof), this petition is filed on September 20, 1985.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), 28 U.S.C. Sec.2101(c) and Rule 17.1(a) of the Rules of this Honorable Court.

This petition for Certiorari is filed in conformity with Rule 21 of the Rules of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or inthe Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

During the early morning hours of October 24, 1978, two self-admitted drug addicts, Wynn Dwyer, a layman, and Frederick A. Blanche, III, a licensed Louisiana attorney on probation from the State of Florida for possession of cocaine and marijuana, departed from Baton Rouge, Louisiana. Their destination was the Twenty-Fourth Judicial District Courthouse. Their purpose was to "defend" an American citizen, Benjamin A. Berry, charged with first degree murder, a capital offense under the laws of the State of Louisiana.

During the course of this eighty mile drive Blanche, who was in a state of panic due to his total lack of investigation and preparation, and the unavailability of a qualified plea to a lesser offense, sought the assistance of his fellow drug addict in adopting an eleventh hour trial "strategy". On the morning of October 24, 1978, Blanche, for the very first time, informed his client that he was, in fact, proceeding to trial for first degree murder and facing the death penalty. It was at this precise moment, only minutes before the commencement of his criminal trial, that Benjamin A. Berry first became confronted with the reality of the death penalty.

Petitioner, Benjamin A. Berry, had been charged by way of grand jury indictment with the first degree murder of Robert Cochran, a Jefferson Parish Sheriff's deputy, during an attempted armed robbery of the Metairie Bank and Trust Company on January 30, 1978. Petitioner, through a family member, retained Frederick A. Blanche,III, without knowledge that said attorney was suffering from a debilitating drug addiction of the most serious kind and subject to active supervised probation for serious drug related offenses in the State of Florida. The attorney's pre-trial consultation with his client was, in large part, limited to a discussion of the availability of narcotics to detainees in the Jefferson Parish Jail.

Following jury selection, trial on the merits commenced on the morning of October 25, 1978, at which time Blanche implemented the so-called "Wynn scenario", a strategy created by the aforementioned layman, on behalf of his unsuspecting client, who had previously entered a plea of "not guilty" to the charged offense. During his opening statement to the jury, Blanche, without petitioner's knowledge or informed consent, conceded his clients guilt, as well as statutory aggravating circumstances warranting the imposition of the death penalty to the jury:

> "From the beginning, we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank. . . That because our Supreme Court has promulgated rules there will be some aggravating circumstances brought to your attention." (Docket No. 66,060, Vol. II, p. 13, emphasis added).

> "I'm not suggesting to you that [petitioner] is innocent of a crime, but I am asking you to presume at least at this point that he may be innocent of the crime of first degree murder." Id., at 17-18 (emphasis added).

Before the State completed its case, again acting without the knowledge or informed consent of his client, Mr. Blanche, stipulated into evidence the following facts:

> "Alright, ladies and gentlemen of the jury, I have before me a document which contains a stipulation to a set of fact agreed upon by the State and by the Defense Counsel. I'm going to read this to you and you're to accept these facts as having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand?... O.K. 'First, that defendant', that's the

> defendant, Berry, went to the Metairie Bank on the morning of January 30, 1978 intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Rong Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that Detective recovered a spent 9mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body.' Now you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that? ...O.K. Would you file this of record please. Make that "Stipulation 2" as title of exhibit." (See p.2, Stipulations-marked Berry Fed #1, Federal Evid. Hearing, Aug. 28, 1984), (emphasis added).

After these stipulations the State could have rested. It had enough for conviction and to warrant the imposition of the Death Penalty. After these stipulations the proceedings amounted to no more than "ceremony".

At no time prior to reading the questioned stipulations to the jury did the trial court make any effort to ascertain petitioner's informed consent to the stipulation, much less his awareness of the serious legal consequences of said stipulation. Further, the jury was not informed by defense counsel or instructed by the trial court that the order in which the stipulated facts were read did not reflect the sequence of events and such sequence must be established by the State.

Although the State could have safely rested its case after the stipulated facts were read to the jury, it proceeded to cermonially "guild the Lily". Following the presentation of the State's case Blanche called petitioner to the witness stand without adequately preparing his client to testify or advising him of the possible risks and disadvantages of testifying at the guilt-innocence phase of his bifurcated capital trial.

Petitioner took the witness stand as the only defense witness and literally became an instrument of his own destruction by attempting to refute his own stipulation. Although petitioner

testified that he had not initiated the fatal exchange of gunfire with the victim, he was unable to overcome the weight of the stipulated facts. Given these circumstances, the jury was able to rapidly return a verdict of guilty of first degree murder.

At the sentencing stage of the trial the State essentially relied upon the evidence adduced at the guilt-innocence phase of the trial; the stipulations being reread to the jury by the District Attorney.

During the sentencing phase of the trial Blanche presented absolutely no evidence as to mitigation of punishment. Although Blanche had, without hesitation, placed petitioner on the witness stand to admit his guilt, in the guilt-innocence phase, he inexplicably failed to put his client on the stand to beg for his life or express remorse in the penalty phase. Blanche's total lack of pretrial investigation left him unable to present expert medical evidence which would have tended to support his client's version of the incident; i.e., that the victim, rather than petitioner, had fired first.

It was during the sentencing phase that Blanche inexcusably called petitioner's mother as a witness and then changed his mind in the presence of the jury, electing to have her removed from the witness stand without testifying. This indecision on the part of Blanche conveyed the distinct impression to the jury that petitioner's own mother was unwilling or unable to offer evidence in mitigation, or even a plea for mercy, on behalf of her son.

After presenting no evidence at the sentencing phase, Blanche's closing argument to the jury effectively destroyed the only plausible mitigating factor otherwise available to his client; i.e., that the victim had fired the first shot. At no point during his tepid and lackluster closing argument, which could not have exceed five minutes, did Blanche even bother to ask the jury to spare the life of his client. After deliberating the jury returned a recommendation that petitioner be sentenced to death by electrocution. The trial court so sentenced petitioner in accordance with the binding jury recommendation.

The judgment of conviction and sentence of death were

affirmed by the Supreme Court of Louisiana on November 26, 1980, with rehearing being denied. State v. Berry, 391 So.2d 406 (La. 1980). Certiorari was denied by this Honorable Court on May 18, 1981. Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, (1981). Petitioner subsequently filed an application for post conviction relief in the Twenty Fourth Judicial District Court. Following an evidentiary hearing, in which evidence of Blanche's drug addiction was adduced, the trial court denied relief; said ruling being affirmed by the Supreme Court of Louisiana on May 10, 1983. State v. Berry, 430 So.2d 1005 (La. 1983).

Having exhausted all available state remedies, petitioner filed an application for writ of habeas corpus in the United State District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. Sec. 2254, further moving for a stay of execution. The District Court summarily dismissed all of petitioner's claims, with the exception of the ineffective assistance of counsel claim and issued a stay of execution pending the decisions of this court in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, (1984), and, Pulley v. Harris, ___ U.S. ____, 104 S.Ct. 871 (1984), Berry v. King, 576 F.Supp. 943, (ED.La. 1983). On appeal, the United States Court of Appeal remanded the cause following the decisions of this court in Strickland and Pulley. Berry v. King, 736 F.2d 1524 (5th Cir. 1984).

A federal evidentiary hearing was conducted on August 28, 1984. Evidence considered by the habeas court during the course of said evidentiary hearing, in the form of Blanche's own personal medical records revealed the staggering scope of his drug addiction over an eighteen year period.

> HISTORY OF PRESENT ILLNESS: This if the first CDU admission for this 38 year old caucasian male who admits an 18-year history of substance abuse. The patient admits having used Dilaudid, herion, Demerol, alcohol, cocaine, speed, and marijuana, as well as LSD and other hallucinogenic agents. The patient states that he used Demerol, Dilaudid and herion frequently from 1971 to 1979. Usage was parental, last usage being one year ago. Alcohol is used daily in the evenings after work. The patient states that he drinks 6-12 beers per day until he falls asleep. His last drink was the day prior to admission. He uses cocaine approximately once per month but occasional runs do occur. The patient states

that he uses both by snorting and intravenously. Last usage was one day prior to admission. The patient takes Didrex, 50 mg., three per day in the early afternoon. The last usuage was one day prior to admission. The patient states that he smokes approximately 10 joints of marijuana per day, last use being the morning prior to admission. (See medical records envelope placed in record by Magistrate).

On October 26, 1984, the Honorable Jacob J. Meyer, United States Magistrate, issued findings and recommendations which recommended dismissal of the Habeas application. Following petitioner's timely objection to said findings and recommendations, the United States District Court for the Eastern District of Louisiana, the Honorable Martin L.C. Feldman, adopted the findings and recommendation of the magistrate, and dismissed the habeas petition. A certificate of probable cause to appeal was subsequently granted, along with a stay of execution.

On July 1, 1985 the United States Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court. Rehearing was denied on August 13, 1985. A stay of mandate and stay of execution was subsequently issued by the United States Court of Appeals for the Fifth Circuit, subject to the instant application for certiorari being filed in this Honorable Court on or before September 20, 1985. (See Appendices "A", "B", "C", pages 27,41,43 hereof).

REASONS FOR GRANTING WRIT

This Honorable Court should and ought to grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because:

1) The Judgment, sought to be reviewed herein, violates petitioner's right to effective assistance of counsel under the Sixth Amendment, and deprives your petitioner of his right under the Due Process Clauses of the Fifth and Fourteenth Amendments to stand upon his plea of Not Guilty, unless intelligently and voluntarily waived; and,

2) The Judgment, sought to be reviewed herein, incorrectly decided important constitutional questions contrary to the Sixth Circuit [Wiley v. Bowdens, 647 F.2d 642 (6th Cir.1981)] and the Eleventh Circuit [King v. Strickland, 748 F.2d 1462 (11th Cir.1984) cert. denied] and the Eighth Circuit [Grisby v. Mabry, 758 F.2d 226 (8th Cir. 1985)] thereby creating a conflict among the Circuits concerning more than one constitutional standard.

3) The Judgment sought to be reviewed herein, deprived your petitioner of a fair and impartial jury composed of a cross-section of the community in violation of his rights under the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Otherwise, the adversarial process, called for by the Due Process Clause of the Fifth and Fourteenth Amendments will be reduced in Dignity, Force and Respect.

ARGUMENT

Petitioner, an American citizen in the custody of the State of Louisiana, and presently under the sentence of death, has raised substantial constitutional questions concerning his right to effective assistance of counsel at both the guilt-innocence and sentencing phases of his capital trial, as well as his right to trial by a fair and impartial jury chosen from a representative cross section of his community. For the sake of clarity and emphasis, each of these questions is discussed separately.

(A) Trial counsel's admission of his client's guilt, coupled with his later stipulation of certain critical facts amounting to an admission of each and every essential element of the charged offense, including evidence which established in truth, in fact, and in law, specific intent to kill, as well as evidence constituting two statutory aggravating circumstances sufficient to warrant imposition of the death penalty, amounted to the functional equivalent of a guilty plea made without his client's knowledge, and informed consent, thereby vacating his "Not Guilty Plea", and thus served to deprive petitioner of any semblence of effective assistance of Counsel, as well as depriving petitioner of all the Constitutional protections created by a "Not Guilty Plea".

Petitioner primarily contends that he was deprived of even the slightest modicum of effective assistance of counsel in the guilt-innocence phase of his capital trial due to his attorney's reliance upon a disasterous and ill-advised trial strategy in which he conceded petitioner's guilt to the jury during his opening statement and later stipulated into evidence certain crucial facts which indeed constituted an admission of each and every essential element of the charged offense of first degree murder.

Because the Fifth Circuit has disposed of this "stipulation of guilt" issue in a manner contrary to the position of the Sixth and Eleventh Circuits, the opinion of the Fifth Circuit creates a clear conflict among the circuits, while at the same time amounting to a departure from the settled jurisprudence of this court. Each of these considerations creates a compelling ground

for certiorari in this death penalty matter.

In this regard it is specifically urged that one of the stipulated facts, i.e., that petitioner fired his weapon three times, constituted an unequivocal and irrebutable admission of facts which established specific intent to kill or inflict great bodily harm. Moreover, two of the stipulated facts; i.e., that petitioner intended to commit an armed robbery, and later fired three shots, two of which struck and killed deputy Robert Cochran, amount to aggravating factors sufficient to warrant imposition of the death penalty under Louisiana Law, to-wit:

1) Engaged in the perpetration or attempted perpetration of armed robbery; and

2) Specific intent to kill or inflict great bodily harm upon a police officer;

All as provided for by L.S.A. R.S. 14:30 and La.Code of Criminal Procedure Article 905.4.

This argument, which necessarily focuses upon the actual conduct of the attorney during all phases of the capital trial, is buttressed by evidence in the form of the trial attorney's own medical records, which substantiates his drug use, abuse, and dependency during a five year period encompassing the instant capital trial. Although the attorney's documented history of drug use and abuse is not sufficient, in and of itself to give rise to a Sixth Amendment violation, it is nonetheless urged that this fact must present a grave question as to the attorney's ability to make rational and informed tactical choices under any set of circumstances.

The uncontradicted testimony of petitioner indicates that he arrived at the Twenty Fourth Judicial District Courthouse on the morning of his capital murder trial without the slightest knowledge that the state was actively seeking the death penalty against him, instead of allowing him to plead guilty to second degree murder, as consistently represented to him by his defense attorney. During the early moments of his criminal trial petitioner's attorney, without prior consultation with his client, conceded the guilt of his client to the jury by announcing that petitioner was not "innocent of a crime". (Docket no. 66,060, Vol. II, P. 13).

During the State's case in chief, petitioner's attorney, once again acting without the knowledge and informed consent of his client, entered into a binding unequivocal, and irrefutable stipulations which amounted to nothing less than an admission of guilt of each and every essential element of the charged offense of first degree murder. Once again, for the record, defense counsel stipulated in the following order:

> "Berry went to the Metairie Bank on the morning of January 30, 1978, with the intent of committing an armed robbery. . . After entering the bank the [petitioner] fired three shots, two of which struck and killed Deputy

> Cochran. . . Deputy Cochran did fire one shot with his service revolver which shot struck the [petitioner]." State v. Berry, supra. 430 So.2d at 1012.

At no time prior to accepting said stipulation in the presence of the jury did the trial judge even cursorily attempt to ascertain petitioner's acquiescence in, or informed consent to, these devastating and fatal stipulations.

Ironically, then as today, Louisiana Law expressly prevented a capital defendant from entering an unqualified guilty plea to an offense carrying the death penalty. (See, Article 557 of the Louisiana Code of Criminal Procedure, and, State v. Jett, 419 So.2d 844, (La. 1982). Apparently, petitioner's trial attorney was able to indirectly accomplish that which the law expressly prevented his client from directly accomplishing; i.e., a self-supplied judgment of conviction tantamount to suicide.

At the outset, it is worth noting that the District Court treated the "stipulation of guilt" question as harmless and nonprejudicial error due to petitioner's subsequent trial testimony, in which he purportedly ratified the substance of the stipulation and thereby unknowingly consented to the stipulation, after the fact. (See, October 26, 1984 Finding And Recommendation, Pp. 12-14). In so holding, the District Court applied a presumption of correctness to the state court determination that petitioner's trial counsel had rendered reasonably effective assistance of counsel. (Id. P. 9)[1]

The Fifth Circuit, on the other hand, apparently recognized that the claim of effective assistance of counsel presented a "mixed question of fact and law" which allowed the appellate court to substitute its own judgment for that of the district court. See, Washington v. Watkins, 655 F.2d 1346, 1351-1354, (5th Cir. 1981). After substituting what it perceived to be the correct standard of law to the facts adduced, the Fifth Circuit provided that the stipulation in question did not encompass an admission of each and every essential element of the charged offense. In this regard, the Fifth Circuit expressly stated that "the stipulation did not admit specific intent". (See, July 2, 1985 Opinion, p.8).

The question presented revolves around the affirmative duty of an attorney, charged with the responsibility of representing an American citizen on trial for his life, to render competent advice to his client concerning his personal decision whether exercise or

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[1]Petitioner did not ratify that portion of the stipulation which suggested that he had fired three shots prior to being wounded by the deputy. Petitioner testified that he spontaneously fired his weapon in the general direction fo the deputy after being struck by a shot. (Docket 66,060, Vol. III P.105). This development put petitioner in the awkward, if not ridiculous, position of taking the witness stand in order to rebut his own stipulaton, not ratifying it.

forego the various array of constitutional and procedural rights afforded by our system of justice. Resolution of this important question logically hinges upon: (1) The classification of the right involved as personal; and (2) The scope of the questioned admission as encompassing intent. Each of these vital considerations deserves separate evaluation.

1) CLASSIFICATION OF THE RIGHT INVOLVED

This Court has consistently recognized that some constitutional rights are so fundamental and essential to our ordered scheme of liberty as to be deemed constitutional rights of the first magnitude, and thus indispensable. Such fundamental constitutional rights are personal to the accused.

Fundamental constitutional rights which are deemed personal to the accused include the right to trial by jury, Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, (1930); the right to appeal, (Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, (1963); the right to (effective) assistance of counsel and the correlative right to forego the assistance of counsel, Faretta v. California, 422 U.S. 860, 95 S.Ct. 2525, (1975); and, the right to plead not guilty and thereby hold the state to its burden of proof beyond a reasonable doubt, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, (1969). It is urged that fundamental constitutional rights are no less momentous, and basic to our system of justice simply because an accused has an attorney.

Perhaps the most significant constitutional right provided to the accused is the inalienable right to plead not guilty and hold the state to its heavy burden of proving each and every essential element of the charged offense beyond a reasonable doubt. Because the right to plead not guilty is a fundamental constitutional right of the first magnitude, and personal to the defendant, the decision as to whether to plead guilty or not guilty is reserved solely for the accused, based upon a knowing and intelligent choice. Wiley v. Bowders, 647 F.2d 642 (6th Cir. 1981). The waiver of a fundamental constitutional right which is deemed personal to the accused must reflect the knowing and informed consent of the accused, rather than the mere preference of his attorney in electing a tactical maneuver. Brownell v. Williams, 455 F.Supp. 106, (D.Maryland, 1972). In this regard, the federal courts still indulge in every reasonable presumption against the waiver of such basic rights. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, (1938).

The Chief Justice of this Honorable Court has recently observed that "such basic decisions as to whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make". Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, (1977). It should be noted that only those rights which are deemed to be less than fundamental and personal are

allocated to defense counsel and subject to waiver without the express consent of the accused. Jones v. Barnes, ___ U.S. ____ 103 S.Ct. 3308, (1983).

The record in the instant case clearly shows that petitioner entered a plea of "not guilty" to the charged crime of first degree murder, a capital offense. As such, his "plea of not guilty place[d] all of the elements of the charged crime into issue", Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, (1895), thereby forcing the state to establish every element of the offense beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, (1970). At no time did petitioner attempt to modify his plea of not guilty. It is worth noting that even if petitioner had indicated his willingness to plead guilty, the trial court would have been without authority to accept said plea due to Louisiana Law expressly prohibiting an unqualified plea of guilty to a capital offense.

The inherently prejudicial impact of the stipulation cannot be lessened by the fact that petitioner subsequently took the witness stand and admitted, denied, or attempted to explain the facts upon which the stipulation was based. Because the stipulation was tantamount to an admission of guilt and confession, the voluntariness of the admission, and petitioner's informed consent thereto, must be measured by the circumstances existing at the time of the questioned stipulation -- and certainly not upon subsequent developments. This uninformed admission of guilt was not cured, or rendered less prejudicial, by subsequent developments any more than an involuntary guilty plea may be cured by an accused's later admission that he committed the underlying crime.

2) SCOPE OF THE STIPULATION

The stipulation entered into by the defense attorney constituted an absolute, unequivocal, and irrevocable admission of petitioner's guilt, thereby amounting to a guilty plea or the functional equivalent of a guilty plea. The stipulation is, for all practical purposes, indistinguishable from a guilty plea, in that a guilty plea serves "as a stipulation that no proof by the prosecution need be advanced. . . It serves as both evidence and a verdict, ending the controversy." Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). From this it is clear that the state could have rested its case after the fatal stipulation and still obtained a judgment of conviction which would have easily withstood appellate and habeas review under the Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, (1979) standard of sufficiency of evidence.

Contrary to the reasoning of the Fifth Circuit, the questioned stipulation, at the very minimum, admitted the uncontradicted existence of certain facts from which established specific intent under Louisiana law as well as the Fifth Circuit

Rule of Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983). Louisiana jurisprudence has consistently recognized that: "though intent is a question of fact it need not be proven as a fact. It may be inferred from the circumstances of the transaction." State v. Kahey, 443 So.2d 475, 494, (La.1983). In this regard the highest court of the state of Louisiana has recognized the multiple blows inflicted upon a victim may furnish a logical basis for establishing specific intent. State v. Kirkpatrick, 443 So.2d 546, (La. 1983), and, State v. Jarman, 445 So.2d 1184, (La. 1984).

Repeated and multiple gunshots have, on numerous occasions, been recognized by the Louisiana Appellate Courts to establish a factual circumstance upon which specific intent is established beyond a reasonable doubt, without any risk of reversal on the basis of a Jackson v. Virginia, supra., challenge. See, State v. Simmons, 466 So.2d 777, (La.App. 4th Cir. 1985), (fact that defendant "attempted" to shoot his victim a second time established of intent); State v. Chairs, 466 So.2d 647, (La. App. 5th Cir. 1985), (rational trier of fact obviously found that defendant fired four shots at a deputy with intent to kill or inflict great bodily harm); State v. Floyd, 458 So.2d 597, (La. App. 3 Cir. 1984), (evidence that defendant fired eleven times at a state trooper was sufficient to support finding that he had specific intent to kill the officer); State v. Coleman, 432 So.2d 323, (La. App. 1 Cir. 1983), (evidence that defendant fired several shots at occupied car was sufficient to support finding of his criminal intent); State v. Straughter, 406 So.2d 221 (La. 1981), (evidence that defendant followed his victim down the street while shooting at him was sufficient to support finding of intent); and State v. Simmons, 454 So.2d 409, (La. App. 4th Cir. 1984), (evidence that defendant shot victim three times with .38 caliber pistol was sufficient to sustain conviction).

Contrary to the reasons of the Fifth Circuit herein any premise which declares that multiple shots fired at a victim does not establish specific intent to kill or inflict great bodily harm, (beyond a reasonable doubt), is inconceivable, to a rational trier of fact or a reviewing court, absent a Plea of Insanity. See Garland v. Maggio, 717 F.2d 199 (5th Cir.1983).

In finding the defendant's argument that he fired only to frighten had no merit a Louisiana Appellate Court, (consistent with the reasoning of Garland v. Maggio, 717 F.2d 199 (5th Cir.1983) correctly stated:

> "his argument that he fired only to frighten [the victim] might have some merit. However, the defendant fired four shots at the deputy." State v. Chairs, 466 So.2d 647 (La. App. 5th Cir. 1985). (Emphasis Added).

The Fifth Circuit, in the recent case of Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983), acknowledged Louisiana Law on this matter and provided that "the repetitious firing of [A] weapon" served to "demonstrate beyond any doubt whatsoever that [the killing] was neither a negligent nor reckless act." 717 F.2d at 204. The Fifth Circuit further noted that "Upon such evidence, no rational juror could have possibly concluded that the person who shot [the victim] lacked the requisite intent to kill him or inflict great bodily harm." Id.,(Emphasis Added). The Fact that multiple gunshots, at the victim, will logically equate to specific intent is the closest thing the law comes to recognizing and tolerating a conclusive presumption. In Louisiana, this premise is irrebutable, absent a plea of insanity. See, State v. Chairs, supra.

It is apparent that the Fifth Circuit was willing to resort to an unrealistic distortion of Louisiana Law, as well as common sense, in order to find that the instant stipulation did not encompass each of the essential elements of the crime, so as to render it an admission of guilt, and the functional equivalent of a guilty plea. In a rather transparent effort to distinguish the facts of the instant case from controlling cases, the court attempted to treat the questioned stipulation as something less than an absolute admission of guilt, thereby allowing it to avoid the difficulties presented by the trial court's failure to ascertain petitioner's informed consent to the actions of his attorney. This reasoning should not be allowed to distract this court's perception of the correct standard of law which is clearly applicable.

3) THE CONTROLLING LAW

The conduct of the attorney effectively deprived petitioner of his plea of not guilty and thus nullified "his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue. . ." Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983). No reported federal case authority allows an attorney to admit or stipulate to facts amounting to an admission of guilt on the part of his client without some effort by the trial court to ascertain the accused's informed consent. The instant decision of the Fifth Circuit, if allowed to stand, will deprive the adversarial process of its dignity and integrity, thus leaving unknowing defendants to the "mercy" of incompetent and constitutionally ineffective counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970).

This court has recognized that "an attorney has no power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his consitutional right to plead not guilty. . ." Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245 (1966); "The constitutional rights of a defendant cannot be waived

under such circumstances." An attorney charged with the solemn responsibility of representing an American Citizen on trial for his life may not, under any circumstances, "override his client's desire expressed in open court to plead not guilty, and enter in the name of his client another plea -- whatever the label -- which would shut off the defendant's constitutional right to. . ." plead not guilty and hold the state to its heavy burden of proof beyond a reasonable doubt. 86 S.Ct. at 1248-1249, (emphasis added).

In Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), the Sixth Circuit recognized that an attorney may not admit his client's guilt in open court, when such an admission would contradict his previously entered plea of not guilty, "unless the defendant unequivocally understands the consequences of the admission." Although a defense attorney "may stipulate to a particular element of a charge or to issues of proof," he "may not stipulate to facts which amount to a functional equivalent of a guilty plea."

Under the same circumstances the Eleventh Circuit found that a habeas "petitioner received ineffective assistance of counsel when his trial counsel conceded (his) guilt to murder at the guilt-innocence phase of his (bifurcated capital) trial and concentrated on a line of argument more properly directed to the penalty phase of the trial." Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983). Where a capital defendant pleads not guilty, (the only plea allowed under Louisiana law) his "counsel, though faced with strong evidence against h'e client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury." 720 F.2d at 1194. "Although counsel at a capital trial may take steps to evoke sympathy prior to the sentencing hearing" there is no logical or tactical "reasons for conceding the defendant's guilt under the bifurcated procedure." 720 F.2d at 1195.

It is noteworthy that Wiley and Spraggins involved instances in which the attorney admitted the guilt of his client during argument to the jury; conduct which is far less egregious and prejudicial than stipulating into evidence facts amounting to an admission of guilt. Although the Fifth Circuit attempted to classify the stipulation as something less than an absolute admission of guilt, its treatment of this question must be deemed as directly contrary to the position of the Sixth and Eleventh Circuits. This obvious conflict among the circuits, along with the fact that an important constitutional question has been wrongly decided in a death penalty matter, furnishes grounds for certiorari. See, Mabry v. Johnson, ____ U.S. ___, 104 S.Ct. 2543, 2546, 81 L.Ed. 2d. 437, 442, (1984), (certiorari granted to resolve conflict among circuits).

4) THE PREJUDICE REQUIREMENT

In the recent decision of Strickland v. Washington, ___ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court fashioned the standard by which claims of ineffective assistance of counsel must be reviewed and evaluated. Pursuant to Strickland, the petitioner must show that his attorney failed to render "reasonable assistance," 104 S.Ct. at 2064, and that there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2067.

Despite the prejudice requirement, Strickland nonetheless acknowledged that "an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." 104 S.Ct. at 2063, 80 L.Ed. 2d at 692. This simply means that, at the very minimum, the accused electing to stand trial is entitled to the assistance of an attorney who adequately presents "the issue of his guilt of innocence. . . to the jury as an adversarial issue." Wiley v. Sowders, supra., 647 F.2d at 650, (emphasis added).

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, ___ U.S. ____, 104 S.Ct. 2039, 2044, 80 L.Ed. 2d 657, 665, (1984). "The benchmark for judging any claim of ineffectiveness (of counsel) must be whether counsel's conduct so undermined the functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-693. The rationale of Strickland and Cronic is that when partisan advocacy is totally lacking, our system of justice becomes unable to produce a reliable, fair, or just result.

The conduct of the attorney in the instant case, in totally conceding his client's guilt, and thereby nullifying his plea of not guilty, without his informed consent, establishes that there was "an actual breakdown of the adversarial process during the trial of this case." United States v. Cronic, supra, 104 S.Ct. at 2046, 80 L.Ed. 2d at 667. Because the fatal stipulation amounted to the functional equivalent of a guilty plea, it deprived petitioner of an "ample opportunity to meet the case of the prosecution." Strickland v. Washington, supra, 104 S.Ct. at 2063, 80 L.Ed.2d at 692.

"The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, supra, 104 S.Ct. at 2045, 80 L.Ed.2d at 666. "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . there has been a denial of

Sixth Amendment rights that make the adversary process itself presumptively unreliable." 104 S.Ct. at 2047, 80 L.Ed. 2d at 668.

Although Strickland presumes an attorney to be competent to provide the required assistance, Cronic explains that "external constraints" may operate to destroy this presumption of competency. United States v. Cronic, supra, 104 S.Ct. at 2048, 80 L. Ed.2d at 669-670. Here, the very nature of the stipulation, coupled with the attorney's drug addiction should erode the customary presumption of attorney competency.

> (B) The failure of the trial attorney to investigate and attempt to discover and utilize the existence of plausible mitigating evidence which would have served to confirm his client's assertion that the victim initiated the fatal gunfire left him literally unable to make any coherent presentation at the penalty phase of the capital trial; with counsel's total ineffectiveness to be evidenced by a haphazard decision which conveyed to the jury the impression that petitioner's own mother was unwilling to testify on behalf of her son and a perfunctory closing argument which failed to even ask the jury to spare his client's life.

The disasterous and ill-advised tactics employed by defense counsel at the guilt-innocence phase of the trial spilled over into the sentencing phase of the bifucrated trial. Just as trial counsel had conceded his client's guilt before the jury and further stipulated to facts amounting to a functional equivalent of a guilty plea, he conceded the only plausible mitigating factor available to his client as to sentence, and failed to make the only closing argument which might have well saved the life of his client.

The defense attorney conducted absolutely no pre-trial investigation in preparation for the sentencing phase of the capital trial, and made no effort to discover or utilize potentially mitigating evidence which was readily available to him upon the slightest exertion of effort. As such, defense counsel presented absolutely no evidence at the sentencing phase.

From the very first moment petitioner first met his attorney he persistently maintained that the victim had initiated the exchange of gunfire and that he had only returned said gunfire. (Page 31 of Federal Evidentiary Hearing). Evidence supporting the proposition that the victim, rather than petitioner, had fired the first shot would have served to militate against petitioner's specific intent to kill or inflict great bodily harm, (which his attorney had already conceded and stipulated away) while serving as a viable mitigating factor to warrant a jury recommendation of life over death.

The information furnished by his client gave rise to an affirmative duty on the part of the attorney to investigate and actively seek out sources of mitigating evidence, all of which was no further away than the coroner's office. Once the attorney was

made aware of factors pertinent to either defense or mitigation, he had a duty to fully investigate and develope all available evidence and then assert the best possible defense. See, Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981); Gaines v. Hopper, 430 F. Supp. 1173 (N.D. GA 1973); and, Lee v. Hopper, 499 F.2d 456, (5th Cir. 1975).

The Strickland rule has applied the prejudice test to the claim of ineffective counsel at the sentencing stage of a capital trial. "When a defendant challenges a death sentence. . . the question is whether there is a reasonable probability that, absent the errors, the sentencer. . .would have concluded that the balance of aggravating and mitigating circumstances did not warant death." Strickland v. Washington, supra, 80 L.Ed. 2d at 698. Perhaps the best evidence of prejudice in this context is illustrated by the method in which the state established those facts upon which the jury could return a recommendation of death.

The state was able to prove petitioner's specific intent, beyond a reasonable doubt, by the stipulation of that petitioner fired three shots, at the Deputy. In addition to proving specific intent to kill or inflict great bodily harm, the order in which the stipulation was read to the jury established as a matter of fact that petitioner fired his weapon first.

The first fact stipulation was that petitioner "went to the Metairie Bank on the morning of January 30, 1978, with the intent of committing an armed robbery" (the underlying felony and aggravating circumstance). The second fact stipulated was that "after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran" (establishing specific intent beyond a reasonable doubt and a second aggravating circumstance, i.e., the killing of a police officer). The third fact stipulated was that "Deputy Cochran did fire one shot with his service revolver which shot struck the defendant." See State v. Berry, 430 So.2d 1005, 1012, (1983). This allowed jurors to accept that the events occurred in the sequence in which they were stipulated. At no point during the trial were the jurors told or instructed otherwise.

In addition to the sequence of the stipulated facts, the state attempted to prove that petitioner had fired the first shot through the direct testimony of two eyewitnesses. The testimony of James Brindle indicated that petitioner fired first upon entering the bank. (State trial transcript, pp. 47-52). The testimony of Melroy McCrossen indicates that he was unable to see who fired the first shot. (State trial transcript, pp.25-44).

More importantly, it appears that McCrossen and Brindle disagreed as to which of the four shots fired in the bank sounded completely different from the others. A review of the complete testimony of these key eyewitnesses shows that the state, in large part, established its contention that petitioner fired first by

the sound of the bullets. This evidence, in the wake of somewhat inconsistent eyewitness testimony, was hardly unshakable or insurmountable.

The testimony of Dr. Monroe Samuels, a forensic pathologist, which was adduced at petitioner's state evidentiary hearing, (see transcript of state evidentiary hearing, pp. 165, et seq.), indicated that petitioner had sustained a gunshot wound to his left arm and abdomen. No evidence suggested that petitioner's wound could have prevented him from firing his weapon. It was the expert opinion of Dr. Samuels that the bullet which struck petitioner had been fired "from a horizontal position" by "an individual. . .standing straight up." (See, transcript of state evidentiary hearing, p. 168).

In addition, Dr. Samuels testified that Deputy Robert Cochran had been struck by two bullets, one of which was incapacitating, and one of which was fatal. (Transcript of state evidentiary hearing, p. 170). The non-fatal bullet, which was fired first, entered the body of the victim "beneath the right shoulder" and passed through the "bone in the upper (right arm)," (transcript of the state evidentiary hearing, p.170). This evidence strongly suggests, if not establishes, that Deputy Cochran could not have discharged his weapon after being struck by either of the bullets fired by petitioner, thus creating a strong premise that the deputy fired first.

The aforementioned evidence, which at the very minimum, tended to substantiate petitioner's version of the incident that the victim had fired first, when coupled with evidence of petitioner's veracity, could have made a difference in the sentence ultimately recommended by the jury. In this regard, the testimony of Mrs. Carol B. Wunderlich, who was not interviewed or utilized by defense counsel would have conveyed the message that petitioner was "a trusted friend and employer of the family." (Transcript of state evidentiary hearing, p. 130).

Such evidence, while not especially significant when viewed standing alone, assumes added significance in view of the testimony of Dr. Samuels, as the combined weight of this testimony related to the credibility of petitioner. It must be remembered that petitioner had persistently told his attorney, as he would later tell the jury, that he had not fired the first shot. The testimony of Dr. Samuels' would have added credence to petitioner's version of the incident. The additional testimony of Mrs. Wunderlich would have further established petitioner's credibility. The combined weight of this testimony could have overcome the rather weak testimony of eyewitnesses concerning the sequence of the gunshots.

Counsel's ineffectiveness did not end with his failure to develop solid mitigating evidence. The total failure of the attorney to utilize such available evidence to attempt to save the

life of his client was further compounded by his calling petitioner's mother to the witness stand, and then changing his mind in the presence of the jury and having her removed. This inexcusable conduct, which was the direct result of a complete lack of trial preparation, created the distinct impression upon the jury that petitioner's own mother was either unwilling or unable to offer any evidence of mitigation, or even a plea for mercy, on behalf of her son.

Finally, trial counsel's total ignorance of facts supporting a plausible mitigating factor caused him to temper his closing argument to the jury. During his closing argument to the jury, which could not have exceeded five minutes, the attorney offered the following version of the incident to the jury: "I think that Ben went there, he went there to rob a bank. He came confronted with a deputy. He saw the gun in Ben's hand and they fired. They exchanged fire, those first two shots." (See, transcript of sentencing hearing, p.19). As such, the attorney reaffirmed its earlier stipulation and effectively destroyed, for the second time, the existence of the only mitigating factor otherwise available to his client; that the victim, rather than petitioner, had initiated the exchange of gunfire.

Moreover, the attorneys closing argument failed to specifically ask the jury to spare the life of his client. Counsel's closing argument merely suggested that there was "some little good" in petitioner and thus asked the jury to "consider compassion". (See, transcript of sentencing hearing, pp. 15-19). Such compassion was obviously short of mercy.

All of the aforestated facts point to the inescapable conclusion that petitioner was totally deprived of any formal presentation at the sentencing stage of the capital trial whatsoever. Despite the failure of the defense attorney to present any mitigation evidence whatsoever, the Fifth Circuit presumed the attorney competent and tersely classified the evidence in possession of Dr. Samuels as "equivocal." (See Appendix "A", page 35 hereof). Once again, the Fifth Circuit has misread Strickland, apparently construing the case to stand for the proposition that no defense is presumptively better than some defense, a proposition unacceptable to the Eleventh Circuit.

Strickland only requires petitioner to show a reasonable probability that, with the effective assistance of counsel at sentencing, the sentencer "would have concluded that the balance of aggravating and mitigating factors did not warrant death." Strickland v. Washington, supra, 104 S.Ct. at 2069. Of course, the Strickland case involved a Florida death penalty case in which the trial judge, rather than a jury, imposed a death sentence without benefit of a jury recommendation as to sentence.

The prejudice test applied in the Strickland case was whether competent assistance would have changed the thought process of one

person, i.e., the sentencing judge. The prejudice test to be applied in the instant case is whether competent legal representation and the full presentation of relevant mitigating evidence would have changed the thought process of one of the twelve jurors. Under Louisiana law, unlike Florida law, the jury recommendation is binding and therefore determinative of the sentence imposed by the court. Even more importantly, the failure of even one juror to concur in a unanimous recommendation of a death sentence requires the trial court to automatically impose a sentence of life imprisonment.

Under these circumstances, even the slightest doubt, although premised upon "equivocal" evidence, might have indeed saved petitioner's life.

The instant case is further distinguishable from Strickland. In Strickland the attorney made a choice to present evidence of the client's remorse to a sentencing judge whom he perceived to be receptive to such a presentation. As such, the attorney made a tactical choice to present one line of defense over what he believed to be another less plausible line of defense. The attorney in Strickland attempted to humanize his client by emphasizing his remorse and acceptance of his responsibility.

To the contrary, the attorney in the instant case did absolutely nothing. As per the recent decision of the Eleventh Circuit in King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, (Mem. No. 84-1231) (April 15, 1984), the facts of the instant case are completely distinguishable from Strickland v. Washington, supra.

> "Nevertheless, we conclude that King's attorney's failure to present available character witnesses in mitigation and his weak closing argument constituted both an unreasonable professional performance by the attorney and impermissible prejudice to King, thereby denying him effective assistance of counsel at the penalty stage of the trial." King v. Strickland, supra 748 F.2d at 1463-1464. CERT. DENIED.

The lower federal courts have, since Strickland, observed the increasing difficulty of assessing prejudice in the context of a capital sentencing hearing when, as here, absolutely no evidence is presented. See, Milton v. Procunier, 744 F.2d 1091, (5th Cir. 1984), (Tate, J., concurring).

Because the conduct of the questioned attorney at the sentencing phase of the bifurcated trial actually deprived petitioner of any meaningful hearing as to sentence, it cannot be said that the appropriate constitutional standards were employed to guide jury discretion, thus creating a substantial possibility of arbitrary and excessive punishment. As such, the instant death penalty must be set aside.

C) The exclusion of so-called "Witherspoon Excludables" from petitioner's petit jury served to violate his Sixth Amendment right to a fair and impartial jury chosen from a representative cross section of the community.

During the first day of petitioner's capital trial all potential jurors were death qualified as per Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, (1968). Certain prospective jurors were excluded from jury service solely because they expressed scruples against imposition of the death penalty. It is urged that the exclusion of these jurors in the guilt-innocence phase of petitioner's bifurcated trial deprived him of a fair and impartial jury composed of a representative cross section of the community, thereby violating his rights under the Sixth Amendment of the United States Constitution.

In Witherspoon v. Illinois, supra, the United States Supreme Court determined that those prospective jurors who indicate "that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them," 391 U.S. at 514, may be excluded from jury service in the trial of capital cases. The Witherspoon decision specifically left open the question as to whether the exclusion of so-called "Witherspoon Excludables" from the guilt-innocence phase of a capital trial might violate the Sixth Amendment rights of the accused. 391 U.S. at 517-518.

Since Witherspoon, the Eighth Circuit has determined, without qualification, that death qualified jurors are more conviction-prone than an ordinary jury from which "death scrupled" jurors are not systematically excluded. "The underrepresentation of a distinct group from a petit jury brought about by systematic challenge for cause affects the integrity of the entire jury system, and no actual prejudice need be shown." (Grigsby v. Mabry, 758 F.2d 226 (8th Cir.1985).

The Fifth Circuit correctly concluded that the grant of certiorari in Grigsby v. Mabry, creates special circumstances which cannot be ignored in connection with this matter. As noted by the Fifth Circuit, petitioner does have cause for complaint in that a juror was excused for cause.[2]

Petitioner is entitled to have the rule of Grigsby applied to this case following ultimate disposition of the cert. petition presently pending.

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[2] "We reject the State's suggestion that the juror challenged for cause was within reach of a peremptory challenge, and therefore Berry may not complain of his exclusion. Contrary to the State's representation in its brief, the Louisiana Supreme Court found that the State had used its quota of peremptory challenges at Berry's trial, and found 'therefore...defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause.'" State v. Berry, 391 So.2d 406 at 410. (See Appendix "A", page 10 hereof).

CONCLUSION

It has been observed that the quality of a civilization may be measured by the manner in which a society administers its system of justice. Given the truthfulness of this proposition, the tragic facts of the instant case say little for the quality of our civilization.

This case involves a fundamental principle lying at the core of our free society; the right of a citizen to be heard, with the assistance of counsel, prior to being condemned. Here, a citizen charged with a serious crime has been afforded a cermonial trial with none of the traditional characteristics of an adversary proceeding, in which his attorney literally stipulated him into the electric chair. Petitioner for all practical purposes does not seek a new trial; he merely seeks the trial which he was never afforded in the first place.

It is urged that the facts present, which are sufficient to shock the conscience of a civilized system, should prompt some degree of judicial indignation. Thus far, throughout the tormented history of this case, through the state and federal juridicary, no court has evidenced the slightest modicum of concern, much less indignation.

The right which our system affords an accused to a fair trial with the effective assistance of counsel somehow implies the right of an accused not to be represented by a criminal and drug addict. In view of the nature of the proceedings at the trial court level and the conduct of defense counsel, petitioner's execution under such circumstances can amount to nothing more than the shamful and unprincipled extermination of human life.

Wherefore, petitioner, Benjamin A. Berry, respectfully requests that this Honorable Court issue a writ of certiorari to review the July 1, 1985 order of the United States Court of Appeals for the Fifth Circuit; and that after due proceedings this court issue a decree reversing said order of the Court of Appeal for the Fifth Circuit, and further remand said cause with instructions that a writ of habeas corpus issue herein.

Respectfully Submitted.

SAMUEL S. DALTON, ATTORNEY FOR
PETITIONER, BENJAMIN A. BERRY
2001 Jefferson Hwy.
Jefferson, La. 70121
(504) 835-4289

APPENDIX "A"

JUDGMENT AND OPINION OF
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(CONSISTING OF 14 PAGES NUMBERED
27 THRU 39).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 85-3043

D. C. Docket No. CA-83-5259-F

BENJAMIN A. BERRY,

Petitioner-Appellant,

versus

JOHN T. KING, Secretary of Department of Corrections, etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before RUBIN, JOLLY, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed. The stay of execution is continued for fifteen days from this date to permit Appellant to apply for certiorari and a further stay. The mandate shall issue forthwith.

July 1, 1985

ISSUED AS MANDATE: July 1, 1985

REISSUED AS MANDATE:

27

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-3043

BENJAMIN A. BERRY,

Petitioner-Appellant,

VERSUS

JOHN T. KING, Secretary of Department of Corrections, Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(July 1, 1985)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:

This appeal from a denial of a petition for habeas corpus raises two issues: (1) whether Benjamin Berry was denied effective assistance of counsel in his state capital murder trial; and (2) whether this circuit should reconsider its position that excluding from the guilt phase of a capital case jurors who are absolutely opposed to the death penalty does not

violate the constitutional rights of the defendant in light of the Eighth Circuit's decision in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), petition for cert. filed sub nom Lockhart v. McCree, 53 USLW 3870 (U.S. May 29, 1985)(No. 84-1865). We affirm the denial of the petition, but leave in effect the stay of execution for fifteen days in order to permit Berry to apply for certiorari.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 30, 1978, Benjamin Berry and David Pennington drove from Baton Rouge to Metairie with the intention of robbing the Metairie Bank and Trust Company. Berry entered the bank and drew a nine millimeter automatic pistol. There was an exchange of gunfire between Berry and Cochran, a Jefferson Parish deputy sheriff working as a guard in the bank, in which Berry fired three shots and Cochran fired one shot. Cochran's shot struck Berry in the lower left chest; two of Berry's shots struck Cochran in the shoulder and the neck, resulting in Cochran's death. Berry and Pennington fled the scene and returned to Baton Rouge, where both were arrested.

Berry was indicted for first-degree murder, and retained Frederick A. Blanche, III as counsel for his trial. The state's evidence identifying Berry as the individual who committed the attempted armed robbery and shooting was overwhelming. At trial,

Blanche conceded in his opening statement that Berry intended to rob the bank in Metairie. In addition, Blanche stipulated to the following facts: (1) that Berry went to the bank intending to commit an armed robbery; (2) after entering the bank Berry fired three shots, two of which struck and killed Cochran; (3) Cochran fired a single shot which struck Berry; and (4) the bullets which were found in Cochran and Berry each came from the other's gun. The guilt phase of the trial proceeded with the state calling various witnesses to the crime, attempting to establish that Berry fired the first shot in the bank. Berry's defense in the guilt phase was that he did not possess the specific intent necessary for a first degree murder conviction under the Louisiana statute. Berry was the only witness in his behalf, and his testimony essentially corroborated the facts in the stipulation. He denied that he fired the first shot, contending that he did not intend to shoot Cochran, but did so only as a self-defense reflex.

The jury found Berry guilty, and the sentencing phase proceeded. During this phase, Blanche introduced no witnesses or evidence on Berry's behalf. Berry's mother was called to testify, but was apparently overcome by emotion and ultimately was not placed on the stand. Berry was sentenced to death.

Berry's conviction was affirmed on appeal, and the United States Supreme Court denied certiorari. Berry then filed a state

habeas corpus petition, which was denied after an evidentiary hearing. The primary charge made in the state habeas petition is the same as that made in this federal petition - that Berry was denied effective assistance of counsel because Blanche was addicted to illegal drugs at the time of the trial. A number of witnesses testified in the state evidentiary hearing, including Blanche himself, the state judge who presided over Berry's trial, David Pennington's attorney, and various associates of Blanche. The testimony of Blanche's associates was that he had, at times in the past, had problems with drugs. The state judge and others who were present at Berry's trial testified that he did a good job in a difficult case. The denial of the state habeas petition was affirmed by the Louisiana Supreme Court. State v. Berry, 430 So.2d 1005 (La. 1983).

Berry then filed this federal habeas corpus petition under 28 U.S.C. § 2254 in the district court for the Eastern District of Louisiana. The district court dismissed all of Berry's claims save that of ineffective assistance of counsel, and granted a stay of execution pending the outcome of Strickland v. Washington, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and Pulley v. Harris, 104 S.Ct. 871 (1984), which were then pending before the Supreme Court. Berry appealed this ruling and this court remanded after the decisions in Strickland and Pulley v. Harris were issued.

In August 1984 an evidentiary hearing was held before a magistrate. At this hearing, the testimony again was largely directed to Blanche's involvement with drugs. The magistrate recommended that Berry's petition be dismissed, and his findings and recommendations were adopted by the district court.

Berry noticed eight separate grounds for appeal from the district court's dismissal; of these only his claims concerning ineffective assistance of counsel and a claim based on the Eighth Circuit's decision in Grigsby v. Mabry have been pressed in this appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In evaluating whether a conviction must be reversed for ineffective assistance of counsel, we utilize the two-part test set forth by the Supreme Court in Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

80 L.Ed.2d at 693.

In evaluating the first prong of the Strickland test, whether counsel's professional conduct falls short of the standard, Strickland teaches us that:

> Judicial scrutiny of counsel's performance must be highly differential . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 694-95.

The prejudice required by the second prong of the Strickland test is something considerably more than the possibility that an unreasonable error by counsel might have had some effect on the trial. As the Supreme Court stated in Strickland: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 698. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the case. Id.

Berry's contentions of ineffective assistance essentially fall into two closely related categories. First, Berry contends that as a result of his alleged drug addiction Blanche failed to adequately investigate and prepare for the defense of his case.

This lack of investigation and preparation allegedly caused Blanche to fail to locate witnesses who could have supplied exculpatory information in the guilt phase and mitigating testimony in the penalty phase. Second, Berry contends that Blanche's drug use, plus his failure to investigate, prevented him making any sort of organized presentation during the guilt and sentencing phases of the trial. Berry contends that in the guilt phase this caused Blanche to stipulate to the "functional equivalent of a plea of guilty" without Berry's consent. He further contends that during the sentencing phase Blanche was unable to make more than a "tepid" plea for his client's life.

We first note that the question whether Blanche in fact used drugs during Berry's trial was far from settled in either the state or the federal evidentiary hearings. In any case, under Strickland the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant. We therefore concentrate on Berry's specific allegations of deficient performance and prejudice.

In Strickland, the Supreme Court noted that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 699. The majority of Berry's

ineffective assistance claims are best disposed of in this fashion. Although Berry contends that Blanche's failure to investigate led him to miss medical and ballistic evidence which would have raised a reasonable doubt concerning who fired the first shot in the bank, and thus a reasonable doubt as to Berry's intent, the only evidence Berry has specifically identified is the testimony of Dr. Monroe Samuels. Dr. Samuels is a forensic pathologist who testified at the state evidentiary hearing. Having examined Dr. Samuels' testimony, we find it to be at best equivocal, and certainly not sufficient to undermine confidence in the outcome of the trial. Since Berry has not pointed to any other evidence which would have been produced by more thorough investigation, we conclude that even if his counsel failed to investigate and that failure was unreasonable, no prejudice has been demonstrated.

Berry's contention that Blanche stipulated to the functional equivalent of a plea of guilty without his consent has more substance. If Berry's characterization of this stipulation were accurate, this allegation would require more analysis. It is clear, however, that the stipulation did not admit every element of guilt. The stipulation did not admit specific intent; the lack of specific intent, a necessary element under La. Rev. Stat. 14:30, was the defense which Blanche presented in the guilt phase. Thus, this stipulation was a concession of facts which

Blanche apparently concluded the state could easily establish and that no advantage would inure to Berry if live witnesses recounted these unfavorable facts for the jury. Berry has also failed to identify any prejudice which resulted from the stipulation. His sole contention is that Blanche failed to subject the prosecution's case to meaningful adversarial testing, and "effectively relieved the state of its burden of proving each and every essential element of first degree murder beyond a reasonable doubt and further deprived petitioner of the opportunity to reap the benefits of any trial error which otherwise [would have] developed as a result of the state being forced to present its evidence." This argument is not convincing. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed." Strickland, 80 L.Ed.2d at 698. It is also true that a defendant is not entitled to the luck of an inept adversary. We therefore conclude that Berry has not identified any prejudice resulting from the stipulation.

For the reasons outlined above, we also find that Berry has demonstrated no prejudice in the sentencing phase from any failure to investigate by Blanche. The only specific mitigating

evidence Berry cites which might have been uncovered by a more thorough investigation is the testimony of Dr. Samuels, which Berry again argues might have swayed the jury in his favor.

Berry's assertion that Blanche first called his mother as a witness, but then decided not to place her on the stand, thus giving the jury the impression that his own mother would not testify in his behalf, is unconvincing. It appears from the record that Mrs. Berry was overcome with emotion and thus unable to testify. Blanche then placed her on the front row of the courtroom, in full view of the jury. This was a reasonable and strategic response to this situation. Finally, we have examined Blanche's closing argument and find it to be within the range of professional competence which is required.

III. THE EFFECT OF GRIGSBY V. MABRY

The Supreme Court decided in Witherspoon v. Illinois, 391 U.S. 510 (1968), that those individuals in the jury venire who indicate "that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them," 391 U.S. at 514, may be excluded from juries in the trial of the penalty phase in capital cases. Witherspoon left open the question whether the exclusion of so-called "Witherspoon excludables" from the guilt phase of the trial of a capital case might violate the rights of the defendant. 391 U.S. at 517-18, 520 n. 18. Since Witherspoon, however, decisions

of this circuit have established as a matter of law that exclusion of jurors authorized by Witherspoon from the guilt phase of the trial does not violate the sixth amendment right to have a jury selected from a representative cross section of the community or the fourteenth amendment due process right to an impartial jury.[1] The Eighth Circuit recently reached a different conclusion in Grigsby v. Mabry and found that the exclusion of Witherspoon excludables from the guilt phase of the trial violates the sixth amendment. From an examination of the jury voir dire, it appears that one juror was challenged on Witherspoon grounds at Berry's trial.[2] Berry therefore asks that we take judicial notice of the underlying factual findings in Grigsby v. Mabry, and hold that this exclusion violated his Sixth Amendment rights.

---

[1]See Matthesson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir.) cert. denied, 83 L.Ed.2d 241 (1984); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984); Sonnier v. Maggio, 720 F.2d 401, 407-08 (5th Cir. 1983) cert. denied, 79 L.Ed.2d 726 (1984); Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. 1981), modified on other grounds, 671 F.2d 858 (5th Cir.) cert. denied, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 583-96 (5th Cir. 1978) cert. denied, 440 U.S. 976 (1979).

[2]We reject the State's suggestion that the juror challenged for cause was within reach of a peremptory challenge, and therefore Berry may not complain of his exclusion. Contrary to the State's representation in its brief, the Louisiana Supreme Court found that the State had used its quota of peremptory challenges at Berry's trial, and found "therefore . . . defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause." 391 So.2d at 410.

We are informed that a petition for certiorari has been filed in the Grigsby case. The Eighth Circuit's decision in Grigsby may not be ignored. We therefore, although affirming the denial of Berry's habeas petition, leave in effect the stay of execution for fifteen days in order to permit Berry to apply for certiorari and a further stay.

AFFIRMED.

APPENDIX "B"
DENIAL OF REHEARING
DATED AUGUST 13, 1985
(CONSISTING OF 1 PAGE
NUMBERED 41)

APPENDIX "B"

IN THE U ITED STATES COURT OF APPE

FOR THE FIFTH IRCUIT

U.S. COURT OF APPEALS
FILED
AUG 13 1985
GILBERT F. GANUCHEAU
CLERK

No. 85-3043

BENJAMIN A. BERRY,

Petitioner-Appellant,

versus

JOHN T. KING, Secretary of Department of Corrections, Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(August 13, 1985)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

[redacted]

REHG-4

41

APPENDIX "C"

STAY OF COURT OF APPEALS' MANDATE

(CONSISTING OF 1 PAGE

NUMBERED 43)

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
SEP 20 1985
GILBERT F. GANUCHEAU
CLERK

No. 85 3043

BENJAMIN A. BERRY,

Petitioner-Appellant.

versus

JOHN T. KING, Secretary
of Department of Corrections,
Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

BEFORE RUBIN, JOLLY and DAVIS, Circuit Judges.

BY THE COURT:

☐ The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☑ The motion of appellant
for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including Sept. 20, 1985 ONLY, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

[redacted]

NDT-4

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APPENDIX "D"

JUDGMENT AND ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
DATED JANUARY 2, 1985
(CONSISTING OF 2 PAGES
NUMBERED 45 AND 46)

(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
JAN 24 2 28 PM '85
LORETTA G. WHYTE
CLERK

BENJAMIN A. BERRY	*	CIVIL ACTION
VERSUS	*	NO. 83-5259
JOHN T. KING, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA and ROSS MAGGIO, WARDEN, STATE PENITENTIARY, ANGOLA, LOUISIANA	*	SECTION "F" * * * * * * * * * * * * A DEATH PENALTY CASE * * * * * * * * * * * *

JUDGMENT

For the written reasons of the Court on file here, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, John T. King, Secretary of the Department of Corrections, State of Louisiana, and Ross Maggio, Warden, State Penitentiary, Angola, Louisiana and against petitioner, Benjamin A. Berry dismissing petitioner's writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the stay of execution entered by this Court on October 27, 1983, be and it is hereby RESCINDED.

New Orleans, Louisiana, this 2d day of January, 1985.

CLERK'S OFFICE
A TRUE COPY
JAN 3 1985
[illegible]
Deputy Clerk

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[redacted]

DATE JAN 3 1985

6 45 (8) 52

(3)

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
JAN 2 11 12 AM '85
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BENJAMIN A. BERRY	*	CIVIL ACTION
VERSUS	*	NO. 83-5259
JOHN T. KING, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA and ROSS MAGGIO, WARDEN, STATE PENITENTIARY, ANGOLA, LOUISIANA	*	SECTION "F" * * * * * * * * * * * * A DEATH PENALTY CASE * * * * * * * * * * * *

ORDER

The Court, after considering the petition, the entire record and transcript of all the proceedings, the applicable law and the Findings and Recommendations of the Magistrate, and after carefully considering and analyzing petitioner's Objections to the Magistrate's Findings and Recommendations, hereby adopts the Magistrate's Findings and Recommendations as its own.

Accordingly,

IT IS ORDERED that the petition of Benjamin A. Berry in the captioned action for the issuance of a writ of habeas corpus is hereby DISMISSED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on October 27, 1983 be and it is hereby RESCINDED.

New Orleans, Louisiana, January 2, 1985.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

JAN 2 1985

DATE OF ENTRY

7
46

(8)

APPENDIX "E"

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE DATED OCTOBER 26, 1984

(CONSISTING OF 20 PAGES NUMBERED 48 THRU 67)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
OCT 23 PM 2:24
LORETTA G. WHYTE

BENJAMIN A. BERRY

VERSUS

JOHN T. KING, SECRETARY OF
THE DEPARTMENT OF CORRECTIONS,
STATE OF LOUISIANA

AND

ROSS MAGGIO, WARDEN, STATE
PENITENTIARY, ANGOLA, LOUISIANA

CIVIL ACTION
NO. 83-5259
SECTION: "F" (3)

****

A DEATH PENALTY CASE

****

FINDINGS AND RECOMMENDATION

I. PROCEDURAL BACKGROUND

Petitioner, Benjamin A. Berry, was tried and convicted of first degree murder before the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. After the guilty verdict was pronounced, the sentencing phase of the trial was held before the same jury that convicted Berry. The jury sentenced Berry to death.

An application for a new trial was denied. Thereafter, petitioner's sentence and conviction were automatically reviewed and affirmed by the Louisiana Supreme Court. State v. Berry, 391 So. 2d 406 (La. 1980).

Petitioner then sought a writ of certiorari to the United States Supreme Court. The application was denied. Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

At this point, petitioner's original trial counsel, Frederick A. Blanche, III, withdrew from the case. Samuel A. Dalton was enrolled as Berry's new counsel.

With new counsel, petitioner sought postconviction habeas corpus relief before the Twenty-Fourth Judicial District Court for the Parish of Jefferson where the crime was committed. The state habeas proceeding was not held before the trial judge, but before Judge Thomas E. Wicker.

DATE OF ENTRY OCT 29 1984

After an evidentiary hearing, Judge Wicker rendered written reasons denying petitioner's application. The Louisiana Supreme Court affirmed the State court's denial of Berry's habeas application. State v. Berry, 430 So. 2d 1005 (La. 1983).

Petitioner moved his case into this federal forum seeking habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner also moved for a Certificate of Probable Cause to stay his execution on the ground that the method of proportionality review he received was erroneously limited to Jefferson Parish and instead should have been based on a statewide review. Judge Martin L. C. Feldman of the district court dismissed as frivolous all of petitioner's previously exhausted claims with the exception of the claim of ineffective assistance of counsel. Berry v. King, No. 83-5259 (E.D. La. Nov. 28, 1983). However, Judge Feldman granted a stay of execution pending final decision in two important cases. Id. The issue of what constitutes effective assistance of counsel was before the United States Supreme Court in Washington v. Strickland, cert. granted, ___ U.S ____, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The Supreme Court also had before it the case of Pulley v. Harris, cert. granted, ___U.S. ___, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983), which involved a California scheme of death sentence review that did not provide for proportionality review.

Petitioner appealed Judge Feldman's rulings on his §2254 application to the United States Fifth Circuit Court of Appeals. After Strickland and Pulley were decided by the Supreme Court, the Fifth Circuit remanded the case to Judge Feldman with instructions to determine the merits of petitioner's §2254 claim based on ineffective assistance of counsel at his trial and to give petitioner a limited period of time within which to amend his §2254 application to include proportionality review of death sentences. Berry v. King, No. 84-3040 (5th Cir. June 12, 1984).

Petitioner timely amended his habeas petition to include the issue of proportionality review contending that the review he received should have been based on a statewide review of capital convictions rather than limited to the parish where the crime was committed. The State of Louisiana waived the exhaustion requirement in order that the issue may be considered in this proceeding. See McGee v. Estelle, 722 F.2d 1205 (5th Cir. 1984) (state may waive the exhaustion requirement).

Judge Feldman, by order of reference dated June 13, 1984, directed this Magistrate to review Berry's application and, if necessary, conduct an evidentiary hearing pursuant to 28 U.S.C. §636(b)(1)(B)(C) and, as applicable, Rule 8 of the Rules governing §2254 applications. This Magistrate held an evidentiary hearing on August 28, 1984, and now reports his findings and recommendation.

II. THE CRIME AND THE ISSUES

A. The Crime

On January 30, 1978, shortly after 10:00 a.m., petitioner, Benjamin A. Berry, and David Pennington arrived in a truck driven from Baton Rouge, Louisiana, where they resided, and parked near the bank they had decided to rob, the Metairie Bank and Trust Company. The robbery was Berry's idea.

First, Pennington entered the bank alone to look around and see if the tellers had much cash. Pennington then returned to the truck and told Berry what he found. Berry decided to go forth with his plan to rob the bank while Pennington waited in the truck.

Berry entered the bank carrying an exposed fifteen round 9 millimeter automatic pistol. Suddenly, there was an exchange of gunfire between Berry and a Jefferson Parish sheriff's deputy who was working a paid security detail at the bank. Three shots were fired by Berry. Two of Berry's shots struck and mortally wounded the guard. The guard fired one shot that hit Berry in the side.

At the time of the exchange of gunfire, there were about seven to ten customers in the bank. While Berry denies any knowledge of a guard being on duty in the bank, Officer Lewis testified that Berry made a statement admitting he knew there was an armed guard in the bank before he entered the bank.

After the exchange of gunfire, Berry immediately fled the bank and he and Pennington returned to Baton Rouge. Berry was forced to seek medical treatment. Upon entering a Baton Rouge hospital, he was arrested and charged with first degree murder in the Jefferson Parish attempted armed robbery. Berry pleaded not guilty and, represented by counsel, Frederick A. Blanche, III, went to trial on October 25, 1978. The trial lasted until October 27, 1978. The jury found Berry guilty of first degree murder. The same jury, in the sentencing phase of the trial, returned a verdict sentencing Berry to death.

B. The Issues:

In the instant proceeding, Berry advances two arguments not previously addressed by this court: 1) he should have received a statewide proportionality review of capital convictions rather than a review limited to the smaller geographic area of Jefferson Parish; and 2) during the trial in the district court, he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

III. PROPORTIONALITY REVIEW

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court, after reviewing death sentences imposed under the capital sentence statutes of two states, Texas and Georgia, issued a per curiam opinion holding that the imposition of the death penalty in the cases under review constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In response to the the holding in Furman, approximately two-thirds of the states, including Louisiana, passed special legislation to conform to Supreme Court guidelines that were intended to eliminate the random, capricious and arbitrary manner in which the death penalty had been imposed.

The general pattern followed by the states was to enact capital case laws that generally included a bifurcated trial, a list of mitigating and aggravating circumstances and automatic appeal to the state's highest court. Louisiana's law follows this pattern and also includes a provision to determine whether the sentence imposed "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." LSA - C.Cr.P. art. 905.9.1. See also LSA - C.Cr.P. arts. 905 - 905.9.

In Pulley v. Harris, ___ U.S. ____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Supreme Court upheld a California capital sentencing scheme that did not include a provision for proportionality review. The Court observed that in its earlier cases, the Court did not focus essentially upon proportionality review, but was primarily concerned with statutes that would provide prompt, automatic and meaningfully appropriate methods for review of death sentences. Thus, the concept of proportionality review is only one of a number of death sentence guidelines and is not essential to the constitutionality of such schemes.

In view of the Court's decision in Pulley, proportionality review is not necessary in a death sentence scheme that otherwise provides sufficient safeguards to avoid arbitrary imposition of the death penalty. Even before Pulley, in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), cert. denied, ___U.S. ___, 103 S.Ct. 3553 (1983), the Fifth Circuit Court of Appeals held Louisiana's system of comparative review of death sentences was constitutionally adequate. "Although the Supreme Court has referred to statewide reviews as commendable in the effort to ensure against an arbitrary imposition of the death penalty, it has never indicated that such a review is a constitutional require-

ment.... [A] review of the murder convictions imposed within [the] venire community is sufficient to ensure against arbitrary imposition of the death sentence." Id. at 395. See Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311, 314 (1983). See also, Martin v. Maggio, No. 81-3496, slip op. 5349 (5th Cir. Aug. 2, 1984).

Berry does not challenge Louisiana's death penalty scheme for lack of proportionality review. He challenges the geographic scope of the review in his case. Petitioner argues that he was denied the equal protection of the laws when he received only a parishwide proportionality review while other capital defendants in Louisiana were receiving a statewide review. If substantiated, this would constitute a valid claim since an instituted procedure, even though not constitutionally mandated must be applied equally to all those similarly situated. However, the Louisiana practice as described below does not correspond to petitioner's claim.

The Louisiana Supreme Court's rule for capital sentence review requires the district attorney to file, on behalf of the state, a memorandum listing each first degree murder case in the district in which the sentence was imposed. La. Sup. Ct. R. 28. The Louisiana Supreme Court then undertakes a comparison of the cases to consider the consistency of the sentence with those imposed in similar cases from the same jurisdiction. See, e.g., State v. Sonnier, 380 So. 2d 1 (La. 1980); State v. Baldwin, 388 So. 2d 664 (La. 1980).

In his amended habeas application, petitioner asserts that the capital defendants in State v. Narcisse, 426 So. 2d 118 (La. 1983) and State v. Moore, 432 So. 2d 118 (La. 1983), did in fact receive a statewide proportionality review. In Narcisse, the Louisiana Supreme Court justified the imposition of the death penalty after a review of cases from parishes other than Lafayette Parish, where the defendant had been sentenced. The court undertook the additional review after finding that it was the first time in fifty years that the death sentence

had been rendered by a jury in Lafayette Parish and that other cases in the parish did not provide an adequate comparison. 426 So. 2d at 139. Similarly, in Moore, the court again reviewed cases from jurisdictions other than Rapides Parish only after finding that there were no cases sufficiently similar in that parish to which a fair comparison could be made. 432 So. 2d at 226.

In the instant case, as mandated by Rule 28, the District Attorney for Jefferson Parish provided the Louisiana Supreme Court a list of first degree murder cases tried in that jurisdiction since 1976. Docket No. 66,060, Supplement to Uniform Capital Sentence Report. This list shows that four first degree murder cases had been tried in the parish. These four cases provided the court with an adequate basis from which the proper comparison of proportionality could be made. In those four cases, the death penalty had not been imposed. However, in the instant case, the court found aggravating circumstances not present in the other cases which warranted the imposition of the death sentence. State v. Berry, 391 So. 2d at 417. Given this adequate basis for comparison, there was no need to resort to a wider proportionality review. See State v. Sonnier, 380 So. 2d at 7 (four other first degree murder prosecutions in the jurisdiction provided an adequate comparison for proportionality review); State v. Baldwin, 388 So. 2d at 677 (two other convictions were sufficient). Accordingly, this Magistrate finds that petitioner received a proportionality review consistent with what other similarly situated defendants were receiving and that therefore he was not denied the equal protection of the laws. Accordingly, petitioner's arguments are without merit.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner sets forth seven grounds to support his claim that his trial counsel rendered ineffective assistance: 1) he was incompetent, conceded guilt at the opening of the trial without petitioner's knowledge and consent and

committed the "ultimate fiasco before the jury by presenting petitioner's mother as his only witness and then changing his mind in front of the jury and withdrawing her as a witness"; 2) counsel's alleged concession and stipulation of "absolute guilt" and all of the elements of first degree murder, including aggravating circumstances to justify the imposition of the death penalty, were done without petitioner's consent and waiver of his constitutional rights invoked by his not guilty plea; 3) failure to investigate and prepare the case for trial; 4) failure to seek out witnesses, including expert witnesses, family members and friends capable of contributing to mitigating circumstances during the sentencing phase of the trial; 5) failure to object that the jury was not allowed to deliberate during the sentencing phase with a list of the mitigating circumstances; 6) failure for lack of diligence to locate a witness who could have laid the foundation for a plea of not guilty by reason of insanity; and 7) counsel was an admitted drug addict and should not have been acting as petitioner's counsel in a first degree murder case when, more likely than not, counsel was ingesting drugs prior to and during the trial and sentencing phase of the case.

It is established law that the Sixth Amendment guarantees a defendant in a criminal proceeding representation by an attorney reasonably likely to render and rendering reasonably effective assistance. See Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980). However, effective assistance of counsel does not mean errorless assistance, nor counsel found ineffective by hindsight. See Nelson, 642 F.2d 903; Beckham, 639 F.2d 262; Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (1980). All of the federal courts of appeals have now held that the proper standard for attorney performance is that of reasonably competent assistance. See Trapnell v. United States, 725 F.2d 149, 151-152 (2nd Cir. 1983).

Petitioner's arguments now must be examined in accordance with the pronouncements of the United States Supreme Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). In that case, the claim of ineffective assistance of counsel focused on the sentencing phase of the trial. As in the case sub judice, the penalty imposed by the jury was death.

Rather than provide a laundry list of rigid and hypertechnical standards for judging effective assistance, the Supreme Court, recognizing that the conduct of a trial "is an art," Id. at ___, 104 S.Ct. at 2061, discussed general principles of law that may be applied in a myriad of factual situations.

Perhaps the most important analytic concept in determining effective assistance lies in the Supreme Court's holding that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect often will be so, that course should be followed." Id. at ___, 104 S.Ct. at 2069-2070.

In the performance/prejudice test approved by the Supreme Court in Strickland the burden of proof squarely rests with the petitioner to establish that he was sufficiently prejudiced by his counsel's ineptness to the extent of undermining the confidence in the outcome of his trial. See Id. at ___, 104 S.Ct. at 2068.

It is an equally important principle of law that state court findings of fact on the trial and appellate levels must, under most circumstances, be accorded a presumption of correctness. 28 U.S.C. §2254(d); Marshall v. Lonberger, ___ U.S.___, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); Sumner v. Mata, 449 U.S. 539, 101 ___S.Ct. 764, 66 L.Ed.2d 722 (1982); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Asper v. Estelle, 709 F.2d 356 (5th Cir. 1983); Germany v. Estelle, 639 F.2d 1301 (5th Cir. 1981), cert. denied, 454 U.S. 850,

102 S.Ct. 290. Therefore, the burden is on petitioner in the case sub judice to establish "by convincing evidence that the factual determination by the state court was erroneous." Sumner v. Mata, 449 U.S. at 550, 101 S.Ct. at 771.

Having set forth the procedural history of this case, the essential details of the crime, and the applicable principles of law, we now turn to an examination of the grounds set forth by petitioner against his trial counsel, Frederick A. Blanche, III.

A. Grounds Nos. One and Two:

These two grounds are grouped together because they concern what petitioner's counsel has characterized as concessions of guilt and admissions of aggravating circumstances made by Berry's attorney without Berry's prior knowledge or consent. These admissions and concessions were sufficient to justify the imposition of the death sentence.

The record indicates that petitioner pleaded "not guilty" to first degree murder on September 22, 1978. However, Blanche stated in his opening statement to the jury:

> From the very beginning, we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank... That because our Supreme Court has promulgated rules there will be some aggravating circumstances that will be brought to your attention

Docket No. 66,060, Vol. II, p. 13.

> I'm not suggesting to you that [Berry] is innocent of a crime, but I am asking you to presume at least at this point, that he may be innocent of the crime of first degree murder.

Id. at 17-18.

During the testimony of Don Carson, the evidence custodian and crimes scene technician for the Jefferson Parish Sheriff's Office, the prosecutor stopped his questioning and stated to the court in the presence of the jury: "Your Honor, at this time, all the rest of the testimony of Deputy Carson would be as to the chain of evidence which I understand there will be a stipulation to the chain." Id. at 58-59. In response, Blanche stated: "I stipulate there is no problem with the chain of evidence." Id. at 59. The court thereupon instructed the jury

about the meaning of a stipulation, advising the jury that they are to "accept those facts [in the stipulations] as having been proved, the same as if they had been proved to their (sic) satisfaction." Id.

The trial transcript evidences that before the jury returned from a lunch recess, discussions were held at the bench with Judge Zaccaria, the trial judge, and as a result of the conference, a stipulation was agreed upon by the State and counsel for Berry. Id. at 65. The court labeled the stipulation "Stipulation #2" and requested counsel to sign it before the court read it to the jury. Blanche signed it on behalf of petitioner and the assistant district attorney prosecuting Berry signed it on behalf of the State. The jury heard the following stipulation read to them by the court:

> Alright, Ladies and Gentlemen of the Jury, I have before me a document which contains a stipulation to a set of facts agreed upon by the State and by the Defense Counsels. I'm going to read this to you and you're to accept these facts as having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand? ---O.K. "First, that the defendant", that's the defendant, Berry, "went to the Metairie Bank on the morning of January 30th, 1978, with the intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Ron Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that the Detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body." Now, you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that? ---- O.K. Would you file this of record please. Make that "Stipulation #2" as title of the exhibit.

Id. at 66-67.

In analyzing Berry's contention that Blanche's admissions and the above stipulations constituted ineffective assistance of counsel, it is necessary to determine whether Berry had expressly or impliedly consented to these admissions and

if he suffered any prejudice by reason of the admissions and stipulation.

The Sixth Circuit in Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, a case with a somewhat similar factual situation, held that "petitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy." Id. at 650. In Wiley, the court held that "an attorney may not stipulate to facts which amount to the fundamental equivalent of a guilty plea. United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979)." Id. at 649. However, where the petitioner does have knowledge and consents to a proposed stipulation of his guilt, it has been held that such knowledge and consent is proper and petitioner's right to effective assistance of counsel has not been denied. See Palfay v. Cardwell, 448 F.2d 328, 330 (6th Cir. 1971).

In Wiley, the Sixth Circuit Court of Appeals indicated that a decision to plead "guilty" or "not guilty" is a decision "reserved solely for the accused based on his intelligent and voluntary choice." 647 F.2d at 648-649. (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). The court in Wiley also stated: "Similarly, an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of not guilty unless the defendant unequivocally understands the consequences of the admission." Id. at 649. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1965). The Sixth Circuit in Wiley, held that consent must be shown in a manner consistent with Boykin. 647 F.2d at 650. The D. C. Circuit in United States v. Brown, 428 F.2d at 1103, held that when counsel stipulates that defendant had committed all the acts charged in the indictment, the trial judge should address the defendant personally in a manner consistent with Rule 11 of the Federal Rules of Criminal Procedure.

However, in United States v. Robertson, 698 F.2d 703 (5th Cir. 1983) the Fifth Circuit Court of Appeals held that "a plea of not guilty by a defendant represented by counsel, even coupled with an inculpatory stipulation, is a plea of not guilty, and absent evidence of any prosecutorial overreaching, the defendant is not entitled to the protections of Rule 11." Id. at 710. Rule 11 of the Federal Rules of Criminal Procedure requires the trial court to inform the defendant of his rights and to determine that the plea is entered voluntarily. In examining the policy considerations behind Rule 11, the court stated:

> The only situation in which the Federal Rules of Criminal Procedure authorizes a prosecutor to bargain with a defendant is where a defendant agrees to plead guilty or nolo contendere. As a result, only in those two settings is the defendant's voluntariness subject to officially sanctioned coercion. Robertson does not contend that the prosecutor or the trial court judge made any express or implied promises to him in return for his inculpatory stipulations. Thus, absent any evidence of prosecutorial overreaching, Robertson's voluntariness seems no more vulnerable than in any waiver of constitutional proportions.

Id. at 708-709.

The Ninth Circuit in United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980), stated:

> Appellant asks that we make a ruling requiring the trial court to question defendant personally as to the voluntariness of any stipulation of a crucial fact. This we decline to do. Such a rule would needlessly delay and confuse the conduct of a typical trial.... Instead, we hold that when a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.

Id. at 836.

In the instant case, Berry himself testified under oath:

> Once I entered the door? I took about three, maybe four, steps and I already had my gun drawn when I walked in the door. I took about three or four steps and I heard someone holler "Look out!" I glanced to my left and there was a man being pushed to the ground and another man drawing a revolver. I started to turn towards him and he fired a shot that struck me in the left side. And about

the same time I, not really aiming, I just pulled the trigger on my revolver, on my automatic weapon, and I saw the man fall to the floor.
Docket No. 66,060, Vol. III, p. 105.

Accordingly, not only did Berry consent to the stipulation by his silence and refusal to deny the correctness of the same, but his testimony is consistent with "Stipulation #2" and shows Berry's consent to the admission of these facts. The stipulation regarding the chain of evidence does not stipulate any crucial fact that the State was not prepared to prove by an overwhelming amount of evidence.

The burden was upon Berry to prove that the statements of his counsel in opening remarks before the jury and the above stipulations sufficiently prejudiced his trial to the extent that they destroyed confidence in the results. In view of the above, Berry has failed to prove any prejudice by virtue of Blanche's acts.

B. GROUNDS THREE, FOUR AND SIX:

These three grounds are grouped together because they allege the same basic failure on the part of Berry's counsel to fully investigate and prepare the case. Specifically, Berry alleges that his counsel failed to seek out witnesses, including expert witnesses, friends and family members, who were capable of providing mitigating circumstances during the sentencing phase of the trial, and failed or was not diligent in locating a witness who could have laid the foundation for a plea of not guilty by reason of insanity.

The Supreme Court in Strickland, indicated that counsel has a duty to make a "reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." ____ U.S. at _____, 104 S.Ct. at 2066.

Berry had approximately six years from the time of his conviction to the time of the evidentiary hearing before this Magistrate to provide the names of witnesses who should have been called. Nevertheless, Berry was not able to establish that the failure to call any witnesses on his behalf caused him to suffer prejudice during his first degree murder trial.

It is true that Blanche did not subpoena any witnesses for the trial. Docket No. 78-2151, 1982, p. 234. But he testified he did interview Mr. and Mrs. Berry, the parents of petitioner, a priest whom he considered an expert on the death penalty, a psychologist, and his father-in-law who was a medical doctor. Id. at 242. Blanche also attempted to contact the branch manager of the bank that was robbed, but was told by him that "[i]t was the bank's policy that the employees had been instructed not to talk to [him] or cooperate with [him] in any way." Id. at 229.

One witness Berry's counsel may have had in mind was Ruth East. She was outside the bank as Berry fled past her from the scene of the crime. Her testimony at the state habeas hearing indicates that she saw Berry as he fled out of the bank, and that he looked like a "zombie" (sic) and walked strangely. Id. at 180. This person was not offered by Berry at the evidentiary hearing before this Magistrate, but she did testify at the state postconviction habeas proceeding. Id. at 177. In the Magistrate's opinion, East's testimony would not have been helpful to Berry, and he failed to prove he was prejudiced by Blanche's failure to call her as a witness.

Similarly, Blanche did not offer the testimony of a witness he interviewed, Mrs. Carole Wunderlich, in whose home Berry had lived. The Louisiana Supreme Court observed that "While Mrs. Wunderlich would have testified that defendant was a good worker and a trusted friend, she would have to admit that Berry smoked pot and had received an undesirable discharge from military service. It is difficult to second guess a defense attorney on a decision not to call a witness who has

some favorable things to say but would corroborate other unfavorable things." State v. Berry, 430 So.2d at 1012-1013.

Because of Berry's background, any witness who knew Berry presumably would have known something about his drug abuse, his association with a motorcycle gang, his ownership of a gun, or his criminal record. It was perhaps a tactical decision by Blanche not to call such witnesses who, under cross-examination by the State, would have been questioned about their knowledge of Berry's background, revealing damaging evidence before the jury.

Due to the overwhelming evidence of Berry's guilt, it would not be unreasonable for his counsel not to investigate or to limit his investigations. In a similar conclusion, the Louisiana Supreme Court observed that "[a]ttorney Blanche came to a reasonable conclusion that there were no witnesses who could be helpful to his client." State v. Berry, 430 So. 2d at 1012.

Further, not a single witness was identified by Berry who could have provided any of the mitigating circumstances listed in LSA-C.Cr.P. art. 905.5. Thus, Berry failed to carry the burden of proving Blanche's conduct in not calling any witnesses prejudiced his sufficiently to undermine confidence in the trial's outcome.

C. GROUND FIVE:

It is charged by Berry that during the sentencing phase of the trial, his counsel did not object to the trial court's failure to provide the jurors with a list of mitigating circumstances. Pursuant to LSA C.Cr.P. art. 905.3 "[t]he jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

During the jury charges, after the sentencing phase of the trial was concluded, the court stated to the jury: "The Clerk will furnish each of you with a list of the statutory aggravating and mitigating circumstances which you may bring with you during deliberation." Docket No. 66,060, Part 2, Vol. III, p. 29.

Upon completion of the charges, the trial judge directed his clerk to hand the jury the verdict form and sought the approval of counsel for the State and Mr. Berry to send the jury to deliberate. The judge then directed the jury to "commence your deliberation and we will supply you with twelve copies of the aggravating and mitigating circumstances that you are to consider." Id. at 33-34.

The Louisiana Supreme Court, in discussing this issue, stated: "The record is ambivalent. The trial judge's remarks indicate that the jury was probably given an initial list of the statutory aggravating and mitigating circumstances and later furnished copies for each juror." State v. Berry, 430 So. 2d at 1013.

The jury verdict as read by the clerk stated, in part: "Having found the below-listed statutory aggravating circumstance or circumstance and after consideration of the mitigating circumstances offered, the Jury unanimously recommends that Benjamin A. Berry be sentenced to death." Id. at 36. The hand-written aggravating circumstances made as an addendum to the verdict reads:

> Aggravating circumstances, circumstances found: The offender was engaged in the perpetration or attempted perpetration of armed robbery; The victim was a peace officer engaged in his lawful duties; The offender knowingly created the risk of death or great bodily harm to more than one person.

Id. at 38.

In a comparison of the jury's findings of aggravating circumstances with the statutory list in LSA - C.Cr.P. art. 905.4, it appears that the jury found three aggravating circumstances and copied them verbatim from the statute. All of the above suggests to the Magistrate that the jury either had the list of aggravating and mitigating circumstances, or made detailed notes during the court's jury charges. In any event, the Magistrate finds that petitioner has failed to carry the burden of proving that he was prejudiced.

D. GROUND SEVEN:

This claim of ineffective assistance is predicated upon the uncontradicted fact that Berry's attorney had a drug addiction problem, was hospitalized for the same and had a previous felony conviction in Florida relating to drug activities. The fact findings by Judge Thomas C. Wicker in the state habeas proceeding confirm that Blanche was arrested in Florida in 1977 for illegal possession of marijuana and cocaine. He pleaded guilty and was sentenced to serve thirty days in jail. He was placed on five years probation. Docket No. 78-2151, Vol. IV, Exhibit C, p. 9.

The district judge before whom the case was tried stated that he had no cause whatsoever to suspect that Blanche used any illegal drugs at any time during his employment on the trial level of this case. Docket No. 78-2151, Vol. I, p. 137. The judge testified that he did not observe any behavior on the part of Blanche which would have suggested to him the use of alcohol or drugs. Id. Blanche testified under oath that during his representation of Berry from February, 1978 through the three days of the trial in October of 1978, he did not "use or consume any controlled or dangerous substances." Id. at 218. This is the critical period.

Judge Wicker indicated that he had grave doubts that Blanche used any illegal drugs at any time during his employment on the trial level of the case. Docket No. 78-2151, Vol. IV, Exhibit C, p. 9. Indeed, Judge Wicker concluded that Berry failed to prove that Blanche consumed any drugs during his representation of Berry which adversely affected Blanche's representation of Berry. Id.

Blanche's medical records were introduced into evidence at the evidentiary hearing before this Magistrate. They are his medical records from the Baton Rouge Chemical Dependency Units, Inc. in Baton Rouge, Louisiana, for the period of confinement beginning December 10, 1982 through and including January 12, 1983. These re indicate that when Blanche entered the Chemical Dependency

Units on December 10, 1982, approximately four years following the conclusion of the Berry trial, he had severe drug dependency problems, including the use of a number of controlled drugs as well as marijuana, LSD and other hallucinogenic agents. He was also a heavy user of Demerol, Dilaudid and heroin from 1971 to 1979. He drank six to twelve beers per day until he fell asleep. He used cocaine about once a month, both by snorting and intravenously. He smoked approximately ten joints of marijuana a day. The hospital notes indicate a final diagnosis of alcoholism, drug addiction, anxiety depression and other matters not relevant to this hearing.

Accordingly, while the evidence shows that Blanche had drug dependency problems, the state trial court found as a fact that Blanche was not on drugs during the Berry trial and Blanche testified that he had not used any drugs or controlled or dangerous substances during the three day trial.

In the federal habeas hearing, Berry's counsel places emphasis on the testimony of Mary Beth Ellis, at whose home Blanche and one Wynne Dyer stayed the night before the resumption of the trial. Miss Ellis, a friend of Blanche, was told by him that he needed a place to discuss the trial for the next day. Docket No. Fed. 83-5259, p. 73. She permitted him and Dyer to stay in her apartment for the night. She went out and when she returned between 11:00 and 11:30 p.m., she noticed that there were Preludins on a table, a bottle had been emptied and there were some loose pills in the bathroom. She also noticed a spoon and some matches. She was not sure whether the matches had been lit. Id. at 71-73. This was the night before the second day of the trial. Id. at 75. She described Blanche as being "in very good shape" when he came to her apartment to ask if he could spend the night. She testified, "he was very serious" and concerned about the trial. Id. at 77. She did not notice anything unusual about Blanche, including his speech, his dress or his mannerisms. Id. at 78. She gave him a ride the next morning, but noticed nothing unusual about his appearance, condition, behavior,

speech patterns, mannerisms or anything else that would indicate he was not normal Id. at 80.

The foregoing evidence does not establish that Blanche was under the influence of narcotics during the time he tried the Berry case; nor is there any evidence to overcome the strong presumption of correctness that must be afforded to the fact findings of Judge Wicker during the state postconviction evidentiary hearing.

The petitioner has failed to establish that Blanche was using drugs at the time of his representation. In any event, petitioner failed to establish that he suffered any prejudice as a result of Blanche's alleged drug use.

RECOMMENDATION

It is the Magistrate's recommendation that the petition of Benjamin A. Berry for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2254 be DISMISSED.

Failure to file written objections to the proposed findings and recommendation contained in this report within ten (10) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 26th day of October, 1984.

JACOB J. ADLER,
UNITED STATES MAGISTRATE

APPENDIX "F"

LOUISIANA SUPREME COURT DECISION AFFIRMING
STATE DISTRICT COURT DENIAL OF POST CONVICTION
APPLICATION FOR HABEAS CORPUS DATED APRIL 4, 1983
REPORTED IN 430 So.2d 1005 (La.1983)
CONSISTING OF 11 PAGES
NUMBERED 69 THRU 79)

STATE of Louisiana

v.

Benjamin BERRY.

No. 82-K-2515.

Supreme Court of Louisiana.

April 4, 1983.

Concurring Opinion May 10, 1983.

Rehearings Denied May 20, 1983.

Concurring Opinion May 26, 1983.

Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, Thomas C. Wicker, J., of first-degree murder, and he appealed. The Supreme Court, Watson, J., held that: (1) defendant was not deprived of effective assistance of counsel; (2) defendant failed to substantiate claim that jury was not furnished with written list of mitigating circumstances during their deliberations; (3) reference by prosecutor to appellate review of death sentence during closing argument was not error; and (4) defendant was not deprived of due process, equal protection or effective counsel because of remarks in defense attorney's opening argument.

Affirmed.

Calogero, J., concurred with reasons.

Dennis, J., concurred with reasons.

1. Criminal Law ⇐668

In sentencing phase of capital case, defendant is entitled to reasonably competent assistance of attorney acting as a diligent, conscientious advocate for his life. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

2. Criminal Law ⇐641.13(1)

Evaluation of habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first inquiry is whether counsel has violated duty to his client, for example, failing to prepare for trial; and, if so, second inquiry is whether violation has resulted in prejudice to defense of case. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

3. Criminal Law ⇐641.13(5)

Failure of defense attorney to learn about witness who would have testified that defendant, charged with armed robbery and first-degree murder, appeared to be pale, in shock, like a zombie and walked strangely, indicated a deficiency in investigation and preparation; however, no prejudice to defendant was shown, and therefore such failure to prepare did not constitute ineffective assistance of counsel, because description witness would have given was consistent with appearance of person who had committed homicide and been shot in exchange of gunfire. U.S.C.A. Const. Amend. 6; LSA-Const. Art. 1, § 13.

4. Criminal Law ⇐641.13(6)

Even assuming that indigent defender funds were available to defense attorney for employing experts or investigators, there was no showing that expert or lay witnesses could have been discovered who would have bolstered defense, and therefore failure to use such funds did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

5. Criminal Law ⇐641.13(8)

Defense attorney's stipulation of chain of evidence did not constitute ineffective assistance of counsel, because there was no showing of a flaw in the chain. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

6. Criminal Law ⇐641.13(2)

No prejudice to defendant was shown in defense counsel's opening statement in which he told jury he had discovered there was film of criminal episode at bank, while he discovered subsequently that film was not favorable to defendant, while defense attorney used poor judgment in mentioning film to jury without having seen it, he used good judgment in not showing it to jury, and therefore defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

7. Criminal Law ⇐641.13(6)

Stipulation to which defense attorney agreed was an accurate representation of facts of criminal event and did not, as defendant contended, admit that defendant fired first; therefore, by entering stipulation, defense attorney did not violate any duty to defendant, and there was no showing of prejudice sufficient to constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

8. Criminal Law ⇐641.13(6)

There was no evidence of witnesses who could have helped defense, and thus no prejudice was demonstrated so as to compel finding that defense attorney was ineffective in failing to call any witnesses other than defendant in guilt phase of trial. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

9. Criminal Law ⇐641.13(6)

Defense attorney did not fail in his duty to defendant by not calling two witnesses, including defendant's mother, while first witness would have testified that defendant was a good worker and trusted friend, she would have had to admit that defendant smoked pot and had received an undesirable discharge from military service, and with respect to defendant's mother, she could not testify, and defense attorney did next best thing and had her seated on front row, where she sobbed under observation of jury. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

10. Criminal Law ⇐1141(2)

Record was ambivalent as to whether jury received written list of mitigating circumstances during their deliberations; however, burden of proving that he was entitled to relief on that basis rested with defendant, and therefore defendant's claim was unsubstantiated. LSA-C.Cr.P. arts. 905.2, 930.2.

11. Criminal Law ⇐627.5(1)

State did not suppress exculpatory evidence in failing to produce witness at trial or disclose her knowledge to defense; her testimony would not have been exculpatory.

12. Criminal Law ⇐627.6(3)

State did not withhold and suppress favorable evidence consisting of pictures made by bank's cameras; none of the pictures were at all exculpatory.

13. Homicide ⇐326

Errors alleged in death cases are considered despite lack of objection, and therefore defendant's counsel's failure to object to prosecutor's remarks during closing argument was immaterial.

14. Homicide ⇐355

Finality of death penalty outweighs procedural requirements during trial and appeal.

15. Criminal Law ⇐713

Closing argument by prosecutor, who told jury that statutory scheme, recognizing seriousness of consequences, provided adequate safeguards against arbitrary imposition of death penalty, and that weighing of all considerations enumerated in statute warranted imposition in case, did not serve to lessen significance of jury's role in overall scheme, and therefore was not error.

16. Constitutional Law ⇐250.3(3), 268.1(6)
Criminal Law ⇐641.13(2)

Remarks in defense attorney's opening argument to jury did not deprive defendant of due process, equal protection or effective counsel; first remark, in which attorney conceded that defendant intended to rob bank, was a statement of an obvious and incontestable fact, and second statement, in which defense attorney stated that "I'm not suggesting to you that he is innocent of a crime, but I'm asking you to presume, at least at this point, that he may be innocent of the crime of First Degree Murder," formed part of theme of opening statement, that is, that defendant, although culpable, was not guilty of first-degree murder. U.S.C.A. Const.Amends. 5, 6, 14.

Joseph L. Montgomery, Metairie, Martha Simmons, Gretna, for relator.

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William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., William C. Credo, III, Gordan Konrad, Asst. Dist. Attys., for respondents.

WATSON, Justice.*

Defendant, Benjamin Berry, entered a branch bank in Jefferson Parish to commit an armed robbery and shot a security guard, an off-duty deputy sheriff, to death. Berry was tried and convicted of first degree murder. After a sentencing hearing, the jury recommended the death penalty and Berry was sentenced accordingly. The conviction and sentence were affirmed. *State v. Berry*, 391 So.2d 406 (La., 1980), cert. denied 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). Defendant then filed a petition for writ of habeas corpus in the Twenty-Fourth Judicial District Court.

At the evidentiary hearing held by Judge Thomas Wicker on the application, defendant contended that attorney Fred Blanche, III, counsel retained for trial and appeal, was using narcotics from February, 1976, which he was engaged, until October, 1978, the month of trial. Defendant also argued that his counsel was ineffective for other reasons. After hearing the witnesses, the trial court held:

> that petitioner has failed to prove that Blanche consumed any drugs during his representation of Berry which adversely affected Blanche's representation of petitioner. That leaves for consideration petitioner's contention that Blanche failed to properly investigate, prepare, interview and call lay and expert witnesses and generally failed to adequately prepare for the trial of a first degree murder case.
>
> . . . . . .
>
> "After reviewing the entire record of this case and hearing the testimony during these proceedings, this court is persuaded that Fred Blanche, III, did render reasonably effective assistance to petitioner." (Docket No. 80-E-6618, Vol. I, Tr. 311-312)

A writ was granted to review the decision of the trial court. Defendant contends that the trial court erred in ruling that he had effective assistance of counsel at trial and sentencing.

LEGAL STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

[1] Defendants in criminal trials are entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Art. 1, § 13 of the Louisiana Constitution. "Effective assistance" is difficult to define. Louisiana requires that counsel "meet the level of competency normally demanded in criminal cases". *State v. Folse*, 422 So.2d 370 at 380 (La., 1982). This is essentially the standard enunciated in *McMann v. Richard*, 397 U.S. 759 at 771, 90 S.Ct. 1441 at 1449, 25 L.Ed.2d 763 at 773 (1970). In the sentencing phase of a capital case, defendant is entitled to "the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate for his life." *State v. Myles*, 389 So.2d 12 at 28 (La., 1979).

The United States Supreme Court recognizes defendants' right to a lawyer who is within the normal range of competence, the *McMann* definition of effective counsel, and recently expressed the requirement as "a competent attorney." *Engle v. Isaac*, 456 U.S. 107 at 134, 102 S.Ct. 1558 at 1574, 71 L.Ed.2d 783 at 804 (1982). However, the nation's highest court has never refined its definition, leaving the task to the circuit courts. See *McQueen v. Swenson*, 498 F.2d 207 at 214 (8 Cir.1974) and the six opinions filed by the United States Court of Appeal, Fifth Circuit, Unit B, in *Washington v. Strickland*, 693 F.2d 1243 (1982). One scholarly treatment of the subject notes:

> "Implicitly, the sixth amendment also guarantees a right to effective assistance, but the Supreme Court has never fully defined the scope of this right. Without firm guidance, the circuits have experimented with numerous definitions of 'ef-

* Judge CASS CANNON of the Court of Appeal, Third Circuit, participated in this decision as Associate Justice Ad Hoc in place of BLANCHE, J., recused.

fective aid,' and a consensus has finally emerged. Nearly every federal court now equates effective assistance of counsel with competent representation." (Footnotes omitted) 65 Cornell Law Review 669 at 680, 681.

A "competent attorney" giving competent representation is essentially one who "meet[s] the level of competency normally demanded". *Paiva*, supra.

[2] An outstanding analysis of the law and logic involved in considering claims of ineffective assistance of counsel is found in *McQueen v. Swenson*, supra.[1] *McQueen* elucidates a two-step inquiry for determining effectiveness of counsel as follows:

"Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, . . . whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining . . . whether that failure prejudiced his defense." 488 F.2d 207 at 210.

McQueen involved a first degree murder trial where the state produced twenty-six witnesses to negate defendant's self-defense theory. The attorney appointed to represent defendant testified that trial preparation consisted of several jail interviews with his client, most of which were spent discussing another homicide charged against the man. The attorney knew of the forty-one witnesses, including the twenty-six who testified, listed on the indictment, but did not undertake to interview any of them. His general policy was not to interview prosecution witnesses because he did not consider it his duty and he thought it put a lawyer in a "bad light". 488 F.2d 207 at 212.

The *McQueen* court found that the attorney had violated his duty of adequate preparation for trial, but placed the burden on the petitioner in the habeas proceedings to establish prejudice resulting from that inadequate preparation. The holding was summarized as follows:

". . . [F]ailure to make a reasonable investigation may amount to ineffective assistance of counsel. . . ."

* * * * * *

However, ". . . the failure to investigate—though a constitutional error—might in certain circumstances be a 'harmless one' and hence would not justify habeas corpus relief. . . . *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). . . ."

* * * * * *

On remand ". . . the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the admission of such evidence was harmless beyond a reasonable doubt." 488 F.2d 207 at 217, 218 and 220.

The two-step *McQueen* analysis is particularly appropriate when it is alleged in a habeas proceeding that counsel was ineffective for lack of preparation. To reiterate: (1) the first inquiry is whether counsel has violated a duty to his client, for example, failing to prepare for trial; and, if so (2) the second inquiry is whether the violation has resulted in prejudice to the defense of the case.[2] The initial burden of proof is on

1. The Eighth Circuit had historically followed the "mockery of justice" standard and effectively abandoned it in *McQueen* without specifically deciding to do so. The later case of *United States v. Easter*, 539 F.2d 698 (8 Cir., 1976) equates failure to exercise the customary skills and diligence of a reasonably competent attorney with reducing the proceedings to a "mockery of justice".

2. This is consistent with prior Louisiana law which has recognized that a complaint of ineffectiveness must be coupled with a showing by defendant of prejudice. *State v. Landrum*, 307 So.2d 340 (La., 1975); *State v. Kemmer*, 336 So.2d 824 (La., 1976); *State v. Bell*, 346 So.2d 1080 (La., 1977). *State v. Sams*, 438 So.2d 444 (La., 1983). Two Louisiana cases have recently described effective assistance as ". . . not error-free counsel, and not counsel judged ineffec-

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defendant, but, even met, he is entitled to a new trial unless the court can say beyond a reasonable doubt the error was harmless. *Fowler v. Parratt*, 682 F.2d 748 (8 Cir., 1982). Compare *United States v. Haynes*, 687 F.2d 689 (3 Cir., 1982). See 80 N.W. L.R. 289 at 304 and 76 Harvard L.Rev. 1494.

EVIDENTIARY HEARING ON WRIT APPLICATION

The evidence at the evidentiary hearing on defendant's application for writ of habeas corpus focused primarily on the alleged use of drugs by counsel and is summarized as follows:

Roger LeBlanc, a former friend of attorney Blanche, gave considerable testimony concerning Blanche's use of drugs. According to LeBlanc, Blanche was a frequent user of drugs during the period which would have coincided with the preparation and trial of defendant's case. LeBlanc admitted that he and Blanche are no longer friends, on the contrary, they are litigating a personal lawsuit involving several million dollars.

Henry McCrossen, the assistant manager of the branch bank on the day of the homicide, testified that defendant "walked in shooting" (Docket No. 82-K-2815, Vol. 2, Tr 247).

Witness Mary Davis gave only meager testimony and witness Anthony Kelly took the Fifth Amendment. Gary Eldridge, a private investigator, identified a report.

Martha Berry, the mother of defendant, testified that she retained attorney Blanche, being unaware that he was on probation for a drug violation in Florida. According to Mrs. Berry, Blanche did not interview her about defendant's family history or childhood. She testified that Blanche first informed her in the courtroom after defendant was convicted that she would be a witness at the sentencing. Being too emotional at that point to speak, she could not testify.

Carole Wunderlich, co-owner with her husband of a radiator service in Baton Rouge, said she told Blanche that she would come to the trial and testify on behalf of Berry that he was a good worker and a trusted friend. However, she would have had to admit that she did not know Berry was a member of a motorcycle gang and brought a gun to do battle if necessary with other gangs. Also, she would have had to disclose to the jury that defendant smoked pot and received an undesirable discharge from the military.

It was stipulated that two brothers and a sister of defendant, if called at trial, would have testified substantially the same as Wunderlich on behalf of Berry. Another witness, one Frank Elms, was not present but apparently it was stipulated that he would have also testified on behalf of the defendant at the sentencing hearing.

Frank Zaccaria, a district judge of approximately sixteen years experience, presided over the guilt and sentencing phase of Berry's trial and testified that Blanche's defense work was "outstanding". After noting that Blanche appeared before him not only at trial but in connection with many pretrial motions, Judge Zaccaria summed up Blanche's performance as a lawyer as follows:

"Frankly, I thought it was outstanding to a point where I complimented him from the bench. I think that the transcripts will show that. At one time he did everything he could in his power and he used every strategy that he could, including suggestions to the court, because of the trial strategy, that he wanted me to declare him incompetent. And I told him just the opposite, that I thought he did an outstanding job." (Docket No. 82-K-2815, Vol. II, Tr. 273-274)

tive by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *State v. Ratcliff*, 410 So.2d 1381 (La., 1982) quoting from *U.S. v. Prejean*, 666 F.2d 907 (5 Cir.1974). See *Herring v. Estelle*, 491 F.2d 125 (5 Cir.1974) and *MacKenna v. Ellis*, 280 F.2d 592, cert. denied 368 U.S. 877, 82 S.Ct.

101, 7 L.Ed.2d 78 (1961). See also *State v. Sutton*, supra. The quoted definition is probably the easier to comprehend representation. The difficulty is in determining what is a given case is "reasonably effective" and "competent". The McQueen case provides a workable standard of analysis.

The judge had no reason to suspect that Blanche was on drugs at any time during trial.

Dr. Richard Eugene Gary testified as to the appearance of a person either taking cocaine or "crashing" from cocaine.

Ruth East testified that she had talked to the district attorney's office but never to Blanche. Following the homicide, she was outside the bank and saw defendant leave. She described him as looking like a "zombie" (sic) and walking strangely. (Defendant had been shot in the lower part of the left chest by the security guard.)

Dr. Monroe Samuels talked about bullets and the paths taken by them in the victim and defendant.

Joseph Darby, a reporter experienced in court proceedings, covered the trial. Talking to Blanche at least once a day throughout, he noticed nothing unusual. In his opinion, Blanche did an "effective job".

Attorney Jay C. Zainey represented Pennington, who was involved in the abortive bank robbery with Berry, and described Blanche's performance as "fine". Zainey and Blanche worked together, providing each other with copies of pleadings, discussing strategy and motions, and the progress of the Berry trial. Summing up, Zainey said: ". . . looking back, I don't recall any criticism that I had. He didn't have a whole lot to work with." (Docket No. 83-K-2515, Vol. II, Tr. 481) Zainey saw no indication whatsoever that Blanche was using drugs. On cross-examination, Zainey agreed that Blanche should have prepared Berry's mother for testifying, but noted that Blanche made sure she sat on the front row crying. According to Zainey, it was defendant Berry who decided that his mother should not take the witness stand.

Fred A. Blanche, III, denied the use of drugs during the period of February-October, 1978. However, he admitted being on probation. He said his past legal experience included one year as a law professor, three years as a prosecutor, work in the public defender's office and private practice. Blanche testified that he spoke to Mrs. Berry on numerous occasions and informed her she would be an important witness. Blanche admitted that he did not subpoena witnesses for other phases of the trial. However, he talked to Mr. McCrossen, the banker; a psychologist; and two people from Baton Rouge with whom Berry had lived. Blanche interviewed a priest to whom he was referred by the "Southern Cities' Defense Committee" but decided not to use him as a witness because he was so "radical and wild-eyed" (Docket No. 83-K-2515, Vol. II, Tr. 486). Blanche did not know of any witnesses that could or would have helped the case.

CONTENTIONS IN APPLICATION FOR WRIT OF HABEAS CORPUS

Filed as an application for post conviction relief pursuant to Rule XXVII of the Rules of Supreme Court of Louisiana, and LSA-C.Cr.P. art. 924, et seq., the application sets forth six claims for relief, some of which contain several arguments. All arguments are considered, but they have been regrouped for this opinion.

CLAIM ONE—INEFFECTIVE ASSISTANCE OF COUNSEL

It is contended that attorney Blanche rendered ineffective assistance of counsel to defendant at trial of both guilt and penalty.

Argument One—Failure to Prepare

Defendant claims that Blanche failed to investigate and prepare for trial.

A. RUTH EAST

[1] A specific deviation is alleged with reference to Ruth East, who was known to the prosecution but not to attorney Blanche. East was outside the bank when the defendant fled the scene. According to her testimony at the habeas hearing, she would have testified that defendant appeared to be pale, in shock, like a "zombie" (sic), and walked strangely.

Attorney Blanche's failure to learn about this witness indicates a deficiency in investigation and preparation. However, no prejudice to the defendant has been shown. The description which East would have given is consistent with the appearance of a

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person who has committed a homicide and been shot in an exchange of gun fire. The defense argues that East's testimony "... would have substantially enhanced the Jury deliberations to such an extent that a lesser verdict would have been probable or a sentence of life, without benefit, more appropriate ... or conceivably returned a verdict of Not Guilty by reason of Insanity ...." (Docket No. 80-K-3818, Vol. I, Tr. 48) These contentions are unfounded. East's testimony does not suggest that her appearance would have had an impact on the jury favorable to the defendant, much less the dramatic effects suggested. Prejudice resulting from Blanche's failure to learn about East has not been shown.

B. FAILURE TO USE INDIGENT DEFENDER FUNDS

[4] There is a dispute about whether indigent defender funds were available to attorney Blanche for employing experts or investigators. Assuming, arguendo, that these funds were available, there is no showing that expert or lay witnesses could have been discovered who would have bolstered the defense.

Defendant has not shown any favorable evidence which counsel should have produced. *Fowler v. Parratt*, supra. Compare *United States v. Bayses*, supra.

Argument Two—Stipulations as to Chain of Evidence

[5] Attorney Blanche stipulated the chain of evidence (this apparently related to certain physical evidence including bullet pellets). Absent a flaw in the chain, an attorney cannot be criticized for stipulating to the chain of evidence and saving trial time. There is no showing here of such a flaw.

Argument Three—Film

[6] Defendant contends that attorney Blanche was ineffective in his opening statement, telling the jury he had discovered there was film of the episode at the bank. Blanche said:

"I found out today that there are films of what happened in the bank and if we can make them available to you, I'm going to try to do that. I think a film of the event, of course, would be perhaps more instructive than any witness could possibly be...." (Docket No. 80,080, Vol. II, proceedings Oct. 30, 1978, p. 17)

After making this statement, Blanche apparently discovered, according to Assistant District Attorney Leitz's new trial argument, that the film was not favorable to his client. Leitz said:

"... He viewed them and had ample opportunity to introduce them at trial and decided they were not in the best interest of his client...." (Docket No. 80,080, Vol. III, proceedings Nov. 30, 1978, p. 4)

This court has viewed the film and it would not have been helpful to defendant. It consists of a series of sequential photographs made by different bank cameras. The only picture of the actual shooting shows defendant Berry, gun in hand, pointing it at the failing victim.

Attorney Blanche used poor judgment in mentioning the film to the jury without having seen it, but he used good judgment in not showing it to the jury.

"A determination whether any given action or omission by counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel's judgment...." *United States v. Dennies*, 624 F.2d 190 at 200 (D.C., 1976).

No prejudice to the defendant has been shown.

Argument Four—Handwritten Stipulation

[7] Defendant argues that a handwritten stipulation admits that defendant fired first at the victim, Deputy Robert Cosbrea. This is not entirely accurate.

The handwritten stipulation was read to the jury by the trial judge, as follows:

"Alright, Ladies and Gentlemen of the Jury, I have before me a document which contains a stipulation to a set of facts agreed upon by the State and by the Defense Counsels. I'm going to read this to you and you're to accept these facts as

having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand?—O.K. 'First, that the defendant,' that's the defendant, Berry, 'went to the Metairie Bank on the morning of January 30th, 1978, with the intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Ron Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that the Detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body.' Now, you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that"—O.K. Would you file this of record please. Make that 'Stipulation # 2' as title of the exhibit. Alright, who is your next witness?" (Docket No. 66,080, Vol. II, proceedings Oct. 25, 1978, pp. 66–67).

There is no indication of why defense counsel agreed to the stipulation. It is possible that the bank film was not introduced in evidence because of this stipulation. If the film was counsel's alternative, the stipulation was certainly the only competent choice.

One technique of criminal defense is to stipulate the worst features of a case rather than let the jury hear the evidence from live witnesses and prejudicial exhibits. The stipulation is an accurate representation of the facts of the event and does not, as defendant now contends, admit that defendant fired first. By entering the stipulation, attorney Blanche did not violate any duty to defendant. Further, there is no showing of prejudice.

Argument Five—Failure to Call Witnesses in Guilt Phase

[8] It is contended that attorney Blanche was ineffective in failing to call any witnesses other than defendant in the guilt phase of the trial.

There is no showing of witnesses who could have given testimony favorable to the defendant.[5] The trial judge summed up the case in ruling on the motion for new trial:

"The case you were faced with was a man who had a bullet from the dead deputy's gun removed from his body. He had several very credible eye witnesses pointing him out as the man who walked in the bank and shot the deputy. You had ballistic evidence connecting his gun with his apartment and the deputy's death. This was a chain of evidence that was insurmountable. You did what I consider to be the best thing you could do under the circumstances . . . and that was an attempt to getting a conviction of murder two rather than first degree murder. "You failed. The jury convicted him because of the impelling nature of the evidence, not because of your lack of diligence or ability as an attorney." (Docket No. 82-K-3515, Vol. I, Tr. 125–126)

Since there is no evidence of witnesses who could have helped the defense, no prejudice has been demonstrated.

Argument Six—Failure to Call Witnesses in Sentencing Phase

[9] Attorney Blanche testified that he interviewed several people concerning the sentencing phase of trial, including a priest, a psychologist, a medical doctor, a medical student, and Mrs. Carole Wunderlich in whose home Berry had lived. Attorney Blanche came to a reasonable conclusion that there were no witnesses who would be helpful to his client. While Mrs. Wunderlich would have testified that defendant was a good worker and a trusted friend, she would have had to admit that Berry smoked pot and had received an undesirable dis-

5. Ruth Kent's testimony has been considered earlier in this opinion.

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charge from military service. It is difficult to second guess a defense attorney on a decision not to call a witness who has some favorable things to say but would corroborate other unfavorable things.

Attorney Blanche did not fail in his duty by not calling Mrs. Wunderlich.

As to defendant's mother, Blanche allegedly erred when he attempted to call her to the stand during the sentencing phase and she did not testify. The implication is that the attorney was remiss in not preparing Mrs. Berry to testify. Blanche said he had advised the mother prior to trial that she would be a key witness on behalf of her son. At the habeas hearing, Mrs. Berry denied that the attorney had ever interviewed her as to defendant's family history or character and indicated she was too overcome with emotion to testify.

Blanche should have prepared the witness. Because of their conflicting testimony, it is not clear what was done. According to attorney Zainey, it was Berry who decided that his mother should not take the stand (undoubtedly because of her emotional state). When Mrs. Berry could not testify, Blanche did the next best thing and had her seated on the front row, where she sobbed under the observation of the jury.

In connection with Mrs. Berry, defendant has not carried the burden of showing that attorney Blanche breached a duty which prejudiced his defense.

CONCLUSION AS TO CLAIM I.

The charge of ineffectiveness against attorney Blanche has been thoroughly ventilated by the application and hearing. The arguments and supporting evidence are without merit either because there was no breach of duty or no prejudice was shown. Faced with a devastating case against his client, attorney Blanche gave defendant Berry reasonably competent representation in both the guilt and sentencing phases of the trial.

CLAIM II—NO LIST OF MITIGATING CIRCUMSTANCES TO JURORS

[10] Defendant contends that the jury was not furnished with a copy of the statutory aggravating and mitigating circumstances as required by LSA-C.Cr.P. art. 905.2.

Since the jurors copied certain aggravating circumstances on the verdict form, the only question is whether they received a written list of the mitigating circumstances during their deliberations. The record is ambivalent. The trial judge's remarks indicate that the jury was probably given an initial list of the statutory aggravating and mitigating circumstances and later furnished copies for each juror. Although there was no proof at the evidentiary hearing that this was done, the burden of proving that relief should be granted rests with defendant. LSA-C.Cr.P. art. 930.2. This claim is unsubstantiated and therefore without merit.

CLAIM III—SUPPRESSION OF EVIDENCE

[11] Defendant contends that the State suppressed exculpatory evidence in failing to produce witness East at the trial or disclose her knowledge to the defense. An assistant district attorney had interviewed East prior to trial. What Mrs. East knew was previously summarized in connection with the claim of ineffective counsel. Her testimony would not have been exculpatory. A wounded person leaving the scene of an attempted armed robbery would be expected to appear shocked and unsteady.

This claim lacks merit.

CLAIM IV: STATE SUPPRESSION OF FILM

[12] Defendant contends that the state withheld and suppressed favorable evidence, consisting of pictures made by the bank's cameras. Although not examined by the trial judge at the habeas corpus hearing, the still photographs have now been reviewed. None of the pictures are at all exculpatory.

This claim is without merit.

CLAIM V: CLOSING ARGUMENT OF THE STATE

Defendant contends that he was deprived of due process, equal protection and effec-

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tive assistance of counsel when the prosecutor alluded to appellate review of the sentence during closing argument.

[13, 14] Defense counsel's failure to object to the prosecutor's remarks is immaterial, since errors alleged in death cases are considered despite lack of objection. The finality of the death penalty outweighs procedural requirements during trial and appeal. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *State v. Sonnier*, 379 So.2d 1286 (La., 1980); *State v. Faide*, supra.

[15] In connection with the original appeal, a per curiam denying rehearing previously considered this contention. In summary, the court held:

"Thus, the import of the closing argument was to tell the jury (1) that the statutory scheme, recognizing the seriousness of the consequences, provided adequate safeguards against arbitrary imposition of the death sentence, and (2) that weighing of all the considerations enumerated in the statute warranted imposition in this case. The argument did not serve to lessen the significance of the jury's role in the overall scheme." 391 So.2d 406 at 418.

In some other cases, for example, *State v. Lindsey*, 404 So.2d 466 (La., 1981), a death sentence has been reversed because speculation on a defendant's possible release from life imprisonment has been interjected into the jury's sentencing decision. However, *Lindsey* recognized a possible distinction between that case and *Berry*. See Footnote 18, 404 So.2d 466 at 487. In *State v. Willie*, 410 So.2d 1019 (La., 1982), the sentence was reversed because of argument covering the full gamut of appellate review in the United States.[4] Brief remarks concerning appellate review do not always require sentence reversal. See *State v. Moore*, 434 So.2d 340 (La., 1982) and *State v. Matthews*, 407 So.2d 1180 (La., 1981). As pointed out in the *Berry* per curiam, the issue must be determined in each individual case by considering references to appellate review in context.

The prior per curiam correctly analyzed and disposed of this issue.[5]

CLAIM VI—CONCESSION OF GUILT

[16] Defendant contends that he was deprived of due process, equal protection and effective counsel because of certain remarks in Blanche's opening argument to the jury, as follows:

"From the very beginning we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank....

* * * * * *

"I'm not suggesting to you that he is innocent of a crime, but I'm asking you to presume, at least at this point, that he may be innocent of the crime of First Degree Murder." (Docket No. 96,080, Vol. II, proceedings Oct. 25, 1978, pp. 13, 17–18).

It is argued that Blanche admitted his client's guilt. This is incorrect. The first remark is a comment on an obvious and inescapable fact; counsel may have been trying to establish his candor with the jury. The second remark forms part of the theme

4. The author dissented from reversal of sentence in *State v. Willie*, supra.

5. In Blanche's own closing argument, he told the jurors, in summary: that Berry has some good in him; they should give him the opportunity to live; each should make an independent decision; life in prison would be a sufficiently horrible punishment; Berry is remorseful; he would remain in jail the rest of his life; they were not required to impose the death penalty; Berry is relatively young and not a career criminal; the death penalty should be reserved for such horrible crimes as mass murder; Berry and the victim exchanged shots; Berry will grieve forever for his crime; the crime happened quickly without deliberation; the victim cannot be restored to life; "[o]nly the slightest compassion is required" to oppose the death penalty; and that they should find some compassion for Berry. (Docket No. 96,080, Vol III, proceedings Oct. 26, 1978, p. 19).

State v. Myles, 389 So.2d 12 (La., 1980) held that a perfunctory closing argument in the sentencing phase of a death case amounted to ineffective assistance of counsel. In contrast to *Myles*, supra, Blanche's argument here did not fall below the standard of competency constitutionally required.

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of the opening statement: Berry, although culpable, was not guilty of *First Degree Murder*. Narrowing the presumption of innocence claim to the charge of first degree murder was intended to direct the jury toward a lesser verdict. Read in context these statements are not violations of the attorney's duty. *United States v. Decoster*, supra.

This claim lacks merit.

CONCLUSION

For the reasons assigned, the decision of the trial court denying the application for writ of habeas corpus is affirmed.

AFFIRMED.

CALOGERO, J., concurs and assigns reasons.

DENNIS, J., concurs with reasons.

CALOGERO, Justice, concurring.

I disagree with the majority's relying on the previous treatment (on appeal) of the issue concerning the prosecutor's closing argument to the jury and his references to appellate review. At that time, this Court had not yet taken a majority position that such arguments could ever require reversal of the sentence. It has only been since then, starting with *State v. Lindsey*, 404 So.2d 466 (La.1981), that a majority of this Court has determined that such arguments can require a reversal of the sentence because they inject arbitrary factors into the jury's considerations.[1]

However, after considering this case with those that have since been rendered, I am of the view that the instant case is more on point with those not requiring reversal than with those in which it was deemed necessary to reverse the sentence. I therefore concur.

1. *See, State v. Sawyer*, 422 So.2d 96 (La.1982); *State v. Robinson*, 421 So.2d 228 (La.1982); *State v. Jordan*, 420 So.2d 420 (La.1982); *State v. Brown*, 414 So.2d 689 (La.1982); *State v. Moore*, 414 So.2d 340 (La.1982); *State v. Wilkins*, 410 So.2d 1013 (La.1982); and *State v. Williams*, 397 So.2d 1256 (La.1981).

DENNIS, Justice, concurring.

I agree with the majority's result, but the opinion leaves room for misimpression concerning the application of the proper standards for evaluating ineffective assistance of counsel claims in capital cases.

The majority opinion appears to utilize the two-pronged test of *McQueen v. Swenson*, 498 F.2d 207 (8th Cir.1974) to dispose of all of the claims presented by this petitioner, regardless of whether they relate to lack of trial preparation or to substandard conduct during the guilt and penalty phases of the trial. The *McQueen* test is appropriate for use in resolving those claims of ineffective assistance grounded in lack of trial preparation, but the second prong of the *McQueen* test, particularly as applied in the majority opinion, represents too stringent a burden to be placed fairly upon a defendant for other types of ineffective assistance of counsel claims.

As the majority acknowledges, in the penalty phase of a capital case we have previously held that the standard to be applied is that of a reasonably competent attorney acting as a diligent, conscientious advocate for the defendant's life. *State v. Myles*, 389 So.2d 12, 28 (La.1979). The majority's statement that "the initial burden of proof is on the defendant, but once met, he is entitled to a new trial unless the court can say beyond a reasonable doubt the error was harmless," is a better expression of the proper application of the burden of showing prejudice for claims of ineffective assistance of counsel, other than for those involving preparation for trial.

It is unclear from the majority opinion which test is applied to each claim of ineffective assistance. Nevertheless, when the correct standards are applied to the evidence in this case, I conclude that Benjamin Berry marginally received the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate for his life. Therefore, I respectfully concur.

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APPENDIX "C"

DECISION OF LOUISIANA SUPREME COURT,
DATED SEPTEMBER 4, 1980 AFFIRMING PETITIONER'S
ORIGINAL CONVICTION AND SENTENCE REPORTED IN
391 So.2d 406
(CONSISTING OF 16 PAGES NUMBERED
81 THRU 96)

c. sell, transfer, assign, convey, lease, sublet, Mortgage or otherwise dispose of or deal with all or any part of the property except as otherwise agreed among the Partners."

In fact, only Claiter could so bind the partnership. Art. 10 concludes:

"The Partners in Commendam shall not participate in the management or control of the Partnership's business, nor shall they transact any business for the Partnership, said powers being vested solely and exclusively in the General Partner."

Juban and the Court accepted this stipulation and proceeded without adding the partnership as a defendant. Having induced such reliance, the partnership cannot now be heard to repudiate the stipulation.

STATE of Louisiana

v.

Benjamin A. BERRY.

No. 66068.

Supreme Court of Louisiana.

Sept. 4, 1980.

On Rehearing Nov. 28, 1980.

Dissenting Opinion Dec. 19, 1980.

Defendant was convicted on a jury verdict before the 24th Judicial District Court, Parish of Jefferson, Frank V. Zaccaria, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Calogero, J., held that: (1) statute which permits State to exclude jurors who oppose the death penalty without a showing that such opposition would interfere with their ability to determine guilt or innocence, under bifurcated scheme in which jury would consider evidence at sentencing portion relating to aggravating and mitigating circumstances which would not be admissible in the guilt phase, did not unconstitutionally subordinate determination of impartiality as to issue of innocence or guilt in bifurcated trials; (2) trial court did not err in refusing to appoint sanity commission and in denying motions for sequestered jury venire and individual voir dire; (3) victim was a peace officer engaged in his lawful duties at the time of the shooting; (4) statutory scheme which permits State to make both closing argument and rebuttal at sentencing hearing, while defense makes only one argument, is not constitutionally deficient; (5) State's closing argument was not so inflammatory and misleading as to deny defendant a fair hearing from jury during sentencing phase; (6) defense counsel properly pursued issues which would mitigate and reduce the verdict; and (7) sentence of death was not disproportionate to penalty imposed in similar cases.

Affirmed.

Dennis, J., dissented.

Calogero, Fedoroff and Dennis, JJ., would grant rehearing.

Calogero, J., filed opinion dissenting to denial of rehearing.

1. Jury ⇐34

Statute which permits State to exclude jurors who oppose death penalty without showing that such opposition would interfere with their ability to determine guilt or innocence, under bifurcated scheme in which jury would consider evidence at sentencing phase relating to certain aggravating and mitigating circumstances which would not be admissible in guilt phase did not unconstitutionally subordinate determination of impartiality as to issue of innocence or guilt in bifurcated trials. LSA-C.Cr.P. arts. 798, 798(2).

2. Criminal Law ⇐1178

Supreme Court would review merits of defendant's assignments of error, even though they were neither briefed nor argued, because of capital nature of the case.

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5. Criminal Law ⇐625

Trial court is granted considerable discretion in determining if defendant should be afforded mental examination to determine his mental capacity to proceed. LSA-C.Cr.P. art. 648.

4. Mental Health ⇐434

Trial judge, which called recess, had defendant examined by psychiatrist, and allowed testimony from doctor to effect that there was no evidence of any mental disorder, did not abuse his discretion in refusing to appoint sanity commission and to grant sanity hearing. LSA-C.Cr.P. art. 648.

5. Jury ⇐131(12)

Supreme Court could not say that trial court erred in denying motion for sequestered jury venire and individual voir dire filed by defendant, who did not allege in any assignment of error or in argument that prejudicial conduct occurred or show in the record how denial of the motions actually caused prejudice. LSA-C.Cr.P. art. 784.

6. Jury ⇐33(5)

Without showing of systematic exclusion of blacks, state is entitled to exercise its peremptory challenges as it chooses.

7. Jury ⇐33(1)

Trial court did not err in denying motion for mistrial filed by defendant, who did not show systematic exclusion of blacks from the jury.

8. Homicide ⇐300(1)

In prosecution for first-degree murder, based on offense which occurred during period wherein Supreme Court recognized that presence of aggravating circumstances is essential element of crime of first-degree murder under 1977 statutory scheme, trial court correctly charged jury that conviction for first-degree murder required finding of less of four aggravating circumstances. LSA-R.S. 14:30.

9. Homicide ⇐23(1)

In prosecution for first-degree murder, his offense which occurred during period wherein Supreme Court recognized that presence of aggravating circumstance was essential element of crime of first-degree murder under 1977 statutory scheme, whether victim was peace officer engaged in performance of his lawful duties was issue in both guilt phase and sentencing phase of the bifurcated trial. LSA-R.S. 14:30.

10. Sheriffs and Constables ⇐86

Armed deputy sheriff who was wearing his regular uniform at bank during normal banking hours at time he was fatally wounded by defendant and had volunteered for this detail, drawing extra pay from the bank, was acting within scope of his lawful duties as a deputy sheriff when he tried to prevent armed robbery in his presence. LSA-R.S. 14:30.

11. Sheriffs and Constables ⇐79

Deputy sheriff who was being paid to station himself at bank as security guard during his normal off-duty time, duty or job which he was not already required to perform, was not engaged in type of prescribed "services of a law enforcement nature" contemplated by statute making it illegal for deputy sheriff to enter into contract to perform services of such nature. LSA-R.S. 14:140(3).

12. Criminal Law ⇐978

Statutory scheme which permits state to make both closing argument and rebuttal at sentencing hearing, while defense makes only one argument, is not constitutionally deficient. LSA-C.Cr.P. art. 905.2.

13. Criminal Law ⇐966.5(1)

In prosecution for first-degree murder, prosecutor's reference during sentencing phase to defendant's previous convictions, dishonorable military discharge, and membership in a motorcycle club, all of which had been introduced into evidence at trial and related to defendant's background, was not improper. LSA-R.S. 14:30.

14. Criminal Law ⇐1177

In prosecution for first-degree murder, wherein jury returned verdict recommending death penalty based upon finding that defendant had killed peace officer engaged in his lawful duties at the time he was shot,

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that the murder was committed during attempt to commit armed robbery, and that defendant created risk of death or great bodily injury to several other persons who were either in the bank as customers or working there as tellers, prosecution's closing argument during sentencing phase did not likely influence jury in its determination and therefore no substantial violation of defendant's rights occurred warranting reversal of his sentence. LSA-C.Cr.P. art. 921; LSA-R.S. 14:30.

16. Criminal Law ⇐1037.1(1)

In prosecution for first-degree murder, prosecution's rebuttal argument, to which defendant did not object, fairly directed itself toward rebutting defense argument, although it admittedly was more comprehensive than State's opening argument, and did not constitute reversible error. LSA-C.Cr.P. art. 774; LSA-R.S. 14:30.

14. Criminal Law ⇐641.13(6)

In prosecution for first-degree murder, defense counsel, which cross-examined State's witnesses in detail regarding offense and emphasized inconsistency or uncertainty on the part of witnesses, properly pursued issue which would mitigate and reduce the verdict. LSA-R.S. 14:30.

17. Criminal Law ⇐723(1)

In prosecution for first-degree murder, although State's remarks in closing argument bordered on impropriety, they were not of such a nature as to arouse jurors' passion and inject arbitrary factor into determination to impose death sentence. LSA-R.S. 14:30.

15. Homicide ⇐354

In prosecution for first-degree murder wherein sentence of death was imposed, evidence clearly supported jury's finding of three aggravating circumstances, including fact that murder was committed during attempted perpetration of armed robbery, that victim was peace officer engaged in his lawful duties, and that defendant knowingly created risk of death or great bodily harm to more than one person. LSA-R.S. 14:30.

19. Criminal Law ⇐1206(2).

Information contained in sentence investigation report, together with other factors, is to be considered in Supreme Court's determination of whether death sentence is disproportionate to penalty imposed in similar cases, considering both crime and defendant.

20. Criminal Law ⇐1206(2)

In prosecution for first-degree murder, wherein jury found that murder was committed during attempted perpetration of armed robbery, that victim was peace officer engaged in his lawful duties, and that defendant knowingly created risk of death or great bodily harm to more than one person, and wherein pertaining investigation report showed that defendant had history of drug abuse and criminal history consisting of four prior arrests for nonviolent offenses with a conviction for simple burglary, and had received undesirable discharge from armed services, death sentence was not disproportionate to penalty imposed in similar cases, considering both crime and defendant. LSA-R.S. 14:30.

On Application for Rehearing

21. Criminal Law ⇐723(1)

When prosecutor's reference to appellate review of death sentence conveys message that jurors' awesome responsibility is lessened by fact that their decision is not the final one, or if reference contains inaccurate or misleading information, then defendant has not had a fair trial in sentencing phase, and penalty should be vacated. LSA-C.Cr.P. art. 905.9.

22. Criminal Law ⇐723(1)

There is no absolute prohibition against prosecutor's reference in closing argument to commonly known fact that capital sentencing statute requires Supreme Court to review every death sentence, and such a reference does not necessarily serve to induce a juror to discard his responsibility, and thus issue should be determined in each individual case by viewing reference to appellate review in context in which remark was made. LSA-C.Cr.P. art. 905.9.

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(This ca. La., 331 So.2d 489)

28. Criminal Law ⇐723(1)

Prosecutor's closing argument, which told jury that statutory death penalty scheme, provided adequate safeguards against arbitrary imposition of death sentences, and that weighing of all considerations enumerated in statute warranted imposition of death penalty in instant case, did not serve to lessen significance of jury's role in overall scheme, and thus prosecutor's reference in closing to fact that capital sentencing statute requires Supreme Court to review every death sentence did not require reversal. LSA-C.Cr.P. arts. 905.4, 905.5.

William J. Guste, Jr., Atty. Gen., Barbara Bethedge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., Abbott J. Reeves, Patrick C. Loitz, Asst. Dist. Attys., Gretna, for plaintiff-appellee.

Fred A. Blanche, III, Baton Rouge, for defendant-appellant.

Richard Shapiro, New Orleans, for amicus curiae-Southern Prisoners Defense Committee.

CALOGERO, Justice.*

Benjamin A. Berry was charged by grand jury indictment with the crime of first degree murder, in violation of R.S. 14:30. Following the trial, the twelve member jury returned a unanimous verdict of guilty as charged. Thereafter, the second phase of the bifurcated trial was held to determine whether the death penalty should be imposed. The jury unanimously recommended the death sentence. Defendant appeals on the basis of ten assignments of error grouped into three arguments. For the reasons which follow we affirm the conviction and sentence.

The trial revealed the following facts concerning the offense. On January 30, 1978, Benjamin Berry and one David Pennington decided to rob the Metairie Road branch of the Metairie Bank and Trust Company. The pair drove from their apartment in Baton Rouge to the bank in Jefferson Parish. They arrived at approximately 10:00 a. m. Pennington entered the bank alone to look around, more specifically to see if the tellers had much cash. Pennington returned to the truck where the defendant was waiting and advised him of his findings. It is disputed whether or not Pennington told defendant that there was an armed guard inside the bank. Defendant contends that Pennington did not so inform him, but Officer Lamia testified that defendant had made a statement and told him that he did know there was an armed guard in the bank before he entered. In any event Berry decided to proceed with the robbery. While Pennington waited in the truck, Berry entered the bank, with seven to ten customers inside, with his fifteen round, nine millimeter, "automatic" pistol drawn. The guard, a Jefferson Parish Sheriff's Deputy working a paid security detail, exchanged fire with defendant and was fatally wounded. Berry fired three shots, two hit the officer and one hit the wall about three feet above the floor. The officer fired one shot wounding Berry. Defendant immediately fled from the bank after the shooting and the pair returned to Baton Rouge. Berry was later arrested after entering a Baton Rouge hospital for treatment. Berry was charged with first degree murder. At the trial, Berry argued that he did not have the requisite intent to kill the victim but rather that he shot impulsively in self defense, after being fired upon. The state countered this argument by introducing testimony to the effect that Berry shot first and also fired the fatal shot at close range after the victim had dropped his gun upon first being hit.[1]

*The Honorable Gerald P. Fedoroff participated in this decision as an Associate Justice Ad Hoc in place of Associate Justice Fred A. Blanche, Jr., who was recused.

[1] The jury apparently believed the state's version of the facts, finding that Berry did intentionally shoot the deputy sheriff, since they returned a guilty verdict and since "intent to kill or commit great bodily harm" is an element of the crime of first degree murder. From our own review of the record, we find that the evidence supports this finding by the jury.

ASSIGNMENTS OF ERROR NOS. 1 AND 5

By these assignments defendant contends that the trial court erred in failing to quash the indictment. He claims that the indictment fails to charge an offense punishable under a valid statute. In brief he does not explain the thrust of these assignments. He does not attack the constitutionality of the first degree murder statute. Rather, the entirety of his argument in brief under these assignments is that the jury challenges allowed the state under C.Cr.P. art. 798 fail to meet the constitutional requirements set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We will therefore consider that argument.

C.Cr.P. art. 798 provides:

"It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

(1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or

(3) The juror would not convict upon circumstantial evidence."

Defendant urges that § 2 of the above article denies the accused a fair trial by allowing the state to select a jury composed of members who are unlikely to recommend mercy. Defendant argues that it is unconstitutional to allow the state to exclude jurors who oppose the death penalty without a showing that such opposition would interfere with their ability to determine guilt or innocence. Defendant believes that the statute's emphasis on the ability of the juror to impose the death penalty improperly subordinates the determination of impartiality as to the issue of innocence or guilt in bifurcated trials.[1]

Defendant's challenge to the *Witherspoon* based jury selection in bifurcated trials has recently been considered by this Court in *State v. Williams*, 392 So.2d 619, (La.1980). In *Williams*, this Court rejected the contention that the bifurcated trial affects the validity of the *Witherspoon* rationale. Since a rehearing has been granted in *Williams*, we shall readdress the issue here.

In *Witherspoon* defendant challenged the exclusion of jurors who indicated that they had reservations about sentencing a man to death. The petitioner therein maintained that such a jury, unlike one fully chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to death is the kind of juror who would too readily ignore the presumption of a defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilty. To support this view, petitioner Witherspoon cited several studies which he felt demonstrated the partiality of death-qualified jurors toward the prosecution on the issue of guilt or innocence. The Supreme Court rejected petitioner's argument, stating as follows:

"The data adduced by the petitioner, however, are too tentative and fragmen-

1. C.Cr.P. art. 800 provides that the defendant has no cause for complaining that the state was erroneously allowed a challenge for cause (a *Witherspoon* challenge) unless the state has used all of its peremptory challenges, such that the effect of the erroneous ruling is to allow the state more peremptory challenges than it is entitled to by law. Although the trial court only counted seven peremptory challenges by the state, which would render defendant's argument here moot, we have noted twelve such challenges in the record and therefore find that defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause.

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tary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 88 S.Ct. at 1776-1775.

[2] In the instant case, defendant contends that *Witherspoon* is not dispositive of his claims since the Court there was not presented with a bifurcated trial proceeding. However, this distinction makes little if any difference in result. In *Witherspoon*, the same jury which decided the question of defendant's guilt also was called upon to recommend sentence. The only significant change under the present bifurcated scheme is the consideration by the jury of additional evidence at the sentencing portion of the trial relating to certain aggravating and mitigating circumstances which would not be admissible in the guilt phase. The question herein as to the representativeness of the jury at trial on the issue of guilt appears to be precisely the same as that raised by the petitioner in *Witherspoon*. Thus we find defendant's argument to be without merit.

ASSIGNMENTS OF ERROR NOS. 2, 3, AND 4

[3] These assignments of error were neither briefed nor argued before this Court. While assignments of error neither briefed nor argued are generally considered abandoned, *State v. Sonnier*, 379 So.2d 1236 (La.1979); *State v. Wientjes*, 341 So.2d 360 (La.1976); and *State v. Phillips*, 327 So.2d 1187 (La.1976), we will review the merits of these assignments of error, because of the capital nature of the case. *State v. Jones*, 332 So.2d 466 (La.1976).

[3, 4] Defendant contends that the trial court erred by refusing to appoint a sanity commission and to grant a sanity hearing. The trial court is granted considerable discretion in determining if defendant should be afforded a mental examination to determine defendant's mental capacity to proceed. C.Cr.P. art. 643; and *State v. Clark*, 367 So.2d 311 (La.1979). Here the trial judge called a recess, had defendant examined by a psychiatrist, and allowed testimony from the doctor which was to the effect that there was no evidence of any mental disorder. There is no indication that the trial judge abused his discretion here.

[5] Defendant also contends that the trial court erred in denying his motion for a sequestered jury venire and individual voir dire. C.Cr.P. art. 784 grants the trial court discretion in determining whether jurors should be called singly or in groups. Defendant does not allege in any assignment of error that any prejudicial conduct occurred because of the unsequestered voir dire. The record does not show how the denial of the motion actually caused prejudice to defendant and no prejudice has been alleged in argument. Therefore, we can not say that the denial of the motion was error.

[6, 7] Finally, defendant contends that the trial court erred in denying his motion for a mistrial because blacks were systematically excluded. Without such a showing of systematic exclusion of blacks, the state is entitled to exercise its peremptory challenges as it chooses. *State v. Albert*, 381 So.2d 434 (La.1980), No. 65,765; and *State v. Allen*, 380 So.2d 28 (La.1980).

Therefore, we find that none of these assignments of error present reversible error.

ASSIGNMENT OF ERROR NO. 6

By this assignment of error defendant contends that the trial court erred in failing to instruct the jury that, as a matter of law, the victim was not a peace officer engaged in his lawful duties at the time of the shooting. Defendant requested a special

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jury charge on this issue and the request was denied. This assignment relates to both the guilt phase of the trial and the sentencing phase.

[8, 9] The first degree murder statute in effect at the time of the offense provided as follows:

"First degree murder is the killing of a human being: when the offender has a specific intent to kill or inflict great bodily harm."

However, the instant offense occurred during the effective period of *State v. Payton*, 361 So.2d 886 (La.1978), wherein this Court recognized that the presence of aggravating circumstances is an essential element of the crime of first degree murder under Louisiana's 1977 statutory scheme. Thus, the trial court correctly charged the jury that a conviction for first degree murder required a finding of one of four aggravating circumstances: (1) the murder was committed in the course of aggravated rape, aggravated kidnapping, aggravated burglary, armed robbery, or attempts to commit these crimes; (2) the murder of a fireman or peace officer engaged in his lawful duties; (3) murder by which the offender knowingly created risk of death or great bodily harm to more than one person; or (4) murder committed for remuneration. Therefore, the question of whether the victim was a peace officer engaged in the performance of his lawful duties was an issue in both phases of the bifurcated trial.

The victim was a Jefferson Parish Sheriff's Deputy wearing his regular Deputy Sheriff's uniform and on guard duty, a security detail, at the bank during normal banking hours at the time of the offense. He, just as other deputy sheriffs often do, had volunteered for this detail, drawing extra pay from the bank. It might be said that he was "moonlighting." He was killed by defendant because he was an armed deputy whose presence was a threat to defendant's bank robbery mission, and his death came during an effort to prevent defendant's successful commission of a serious felony.

[10] Whatever the nature of the deputy's general activities at the bank in the context of the question whether he was engaged in his lawful duties—it was surely within the scope of his lawful duties as a deputy sheriff for him to try to prevent an armed robbery in his presence.[3]

Therefore, we conclude that the the trial judge did not err in refusing defendant's request to charge the jury that the victim was not a peace officer engaged in his lawful duties.

The amicus brief raises an interesting argument in connection with this issue. Therein it is argued that R.S. 14:140(3), a statute defining public contract fraud, indicates that a police officer on private detail does not come within the definition of "a peace officer engaged in his lawful duties" under C.Cr.P. art. 905.4(b).

R.S. 14:140(3) defines public contract fraud as follows:

"When any sheriff or deputy sheriff charged with the duties of enforcing the laws of this state or any political subdivision thereof shall enter into a contract, either written or oral, individually or as a member or stockholder or any partnership, company or corporation with any such person whereby such sheriff or deputy sheriff or partnership, company or corporation of which he is a member or stockholder is to perform any services of a law enforcement nature."

It is argued that since R.S. 14:140(3) makes it illegal for a deputy sheriff to enter into a contract to perform services of a law enforcement nature that Deputy Cochran necessarily was not "engaged in his lawful duties." We disagree with this analysis.

[11] R.S. 14:140(3) was enacted to prevent a sheriff or deputy sheriff from forcing a person to pay money for the services

3. Under a similar fact situation, where a deputy sheriff was on duty as an apartment security guard, this Court held that a parish sheriff's deputy on such duty is considered as an on duty member of the law enforcement agency for the purposes of protecting a defendant's Fourth Amendment rights. *State v. Wilkerson*, 387 So.2d 519 (La.1979).

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that the officers were already required to perform by their employment as law enforcement officers. In other words, a deputy sheriff could not require a bank to pay him for answering a robbery call, a duty he is already required to perform by his very employment as a deputy sheriff. In the case at bar, Deputy Cochran was being paid to station himself at the bank as a security guard during his normal off duty time, in the bank, a duty or job which he was not already required to perform. There is nothing unlawful about the arrangement Deputy Cochran had with the bank. The bank contacted the Sheriff's Department about obtaining someone for the position, the Sheriff's Department assigned the officer to the job, and the whole arrangement was quite legal.

The deputy's presence and general activity at the bank—on a paid detail—is not the type of proscribed "services of a law enforcement nature" contemplated by R.S. 14:140(3).

The amicus argument is without merit.

ASSIGNMENT OF ERROR NO. 7

[12] By this assignment of error defendant alleges that the trial court erred in allowing the state to argue to the jury twice during the sentencing phase of the bifurcated trial and the defense only once.

C.Cr.P. art. 905.2, regarding the sentencing phase of the bifurcated trial, provides in pertinent part:

"Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure."

The applicable code article, C.Cr.P. art. 765(5), provides that the normal order of trial shall allow closing arguments by the state, the defense and the state in rebuttal.

At the sentencing hearing the state made its closing argument, the defense made its argument and then the state made a rebuttal argument, following the statutorily prescribed procedure as set out above.

In the amicus brief it is argued that the Georgia capital sentencing scheme, upon which the Louisiana statute is modeled, supports defendant's argument. In Georgia, the defendant's closing argument is the last presentation to the jury before it commences deliberations on whether to impose the death penalty. In Georgia, this order of closing argument at the sentencing hearing is statutorily prescribed. Ga.Code Ann. § 27-2503. In Louisiana, as stated above, it is statutorily provided that the state have the final argument. While it may be that a different system is to be preferred, the present system is not constitutionally deficient and any change addresses itself to the legislature.

This assignment of error is, therefore, without merit.

ASSIGNMENTS OF ERROR NOS. 8 AND 9

Defendant contends that the trial judge erred when he denied the defense motion for a mistrial (Assignment of Error No. 8) and motion for a new trial (Assignment of Error No. 9), each founded on the contention that the state's closing argument in chief, during the sentencing phase of the bifurcated trial, was so inflammatory and misleading as to deny the defendant a fair hearing from the jury.

The portion of the argument which preceded a defense objection was as follows:

"Ladies and gentlemen of the jury, you have heard all of the evidence, you heard all of the aggravating circumstances. All Mr. Blanche has asked so far is to have compassion ... to have compassion on Benjamin Berry.

"I ask you what compassion did Benjamin Berry have on the wife and children of Robert Cochran? What compassion does a man have who arms himself with a 15 round gun in order to protect himself from one motorcycle club, one motorcycle gang against another? What compassion does this kind of man have? Yet he stands here asking for your compassion. Give me a break. I'm a murderer, but give me a break.

"Certainly, ladies and gentlemen, he's a murderer. A man lies dead in his grave because Benjamin Berry decided he, he was going to be God Almighty."

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The trial judge overruled defendant's objection (that the argument was inflammatory) with the observation that "This is closing argument."

The prosecutor thereafter continued:

"It's a burden. It's a burden for you people to be here representing people of the State of Louisiana, but it's time, ladies and gentlemen--It's time to put to death the people who run our streets, make them unsafe for us to live in, make this a jungle.

"Put him to death. We must be able to go into our houses again at night. Let's be able to go to the bank at 10:00 in the morning and do our banking business. Let's take fear, let's erase fear from the people in this country, and the people in the State of Louisiana.

"We don't have one aggravating circumstance in this. We got (sic) four. He was perpetrating an armed robbery. He was going to kill anybody that got in his way. He killed a policeman with a family in the line of his duty. He put other people, ordinary people, not policemen but ordinary people, people just like you, in danger of death. He executed the man in a cruel and heinous way. And, he stands here asking for your compassion.

"The time for compassion is over. We can go about this world giving everybody compassion but, yet, we have to live in a jungle to survive.

"Do you want to have to walk out your house every day of your life and carry a gun to protect yourself against the Benjamin Berrys of the world?

"The time for softness and the time for compassion is over. It is time for action. And the only action we can bring forth is the death penalty. It's provided for in our law and it's provided for in our law as a detriment against crime. Let the Benjamin Berrys walk through this world knowing they can't do what Benjamin Berry did.

"It's time, ladies and gentlemen. It's time. The free ride for criminals is over. It's gone. It's time for you, citizens of the State of Louisiana, of the United States of America, to step forward, to say there's a time for justice. It's a time we must be firm. We don't want to live in a country with insurrection.

"Ladies and gentlemen, it's not an easy decision but it is one I have to ask you. Each and every one of you on voir dire, which Mr. Blanche said was the time to tell the truth, were asked, 'Could you, if the circumstances were prevented--presented--to you, could you come back with a death penalty?'

"I can't conceive of no (sic) greater case in this world than this one right here where the facts warrant the death penalty. We have a man who was previously convicted, admitted that from the stand, has been thrown out of the armed services, who's a member of a motorcycle gang. What has he done for society except cause turmoil, except to make this a dangerous place for you to live, for your children to live.

"It's time, ladies and gentlemen. It's time. It's time for the people of the world ... the good people, to stand up and be counted.

"I would ask you to come back with the death verdict."

No objection was made to the foregoing portion of the argument. However, after defense argument, state rebuttal argument, the jury instruction and retiring of the jury for deliberation, defense counsel moved for a mistrial contending that the state's argument during the sentencing phase was so inflammatory as to deny defendant a fair trial from the jury.

The trial judge denied the motion.

[13] The portion of the argument to which specific objection was made, reference to defendant's previous conviction, dishonorable military discharge and membership in a motorcycle club, was not improper. All had been introduced into evidence at trial and related to defendant's background, a relevant consideration in the context of defendant's argument for compassion.

Defendant's motion for a mistrial came after the jury had been retired, so that the

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trial judge had no opportunity to admonish the jury and/or counsel the prosecutor on further impermissible argument. Ordinarily we might find the issue not preserved. But because this is a capital case and particularly because this Court has an obligation to examine the record for passion, prejudice or arbitrary factors which may have contributed to the jury's recommendation in favor of the death penalty (*See* Rule 28 and *State v. Sonnier*, 379 So.2d 1326 (La.1980), on rehearing at 1368) we feel compelled to scrutinize the prosecutor's argument for possible reversible error.

C.Cr.P. art. 774 provides that argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case, and further that the argument shall not appeal to prejudice. C.Cr.P. art. 905.2 provides that the procedure in the sentencing phase of the bifurcated trial shall be the same as that provided for the guilt phase in the Code of Criminal Procedure, making C.Cr.P. art. 774 applicable to the sentencing hearing.

The closest the state's argument came to impermissibility was where the district attorney suggested to the jury that they, as well as other citizens, were exposed to threats upon their safety by people like the defendant Benjamin Berry. While it could be argued that these statements were conclusions to be drawn from the evidence (i. e. the likelihood that Berry would again commit a crime since he is a repeat offender) it is more likely that this was an attempt by the state to appeal to the jurors' prejudices and fears.

This Court has in several cases opined that arguments which appeal to emotions and fears of jury members are improper: *State v. Hayes*, 364 So.2d 988 (La.1978) where the state attempted to turn jury deliberations into a plebiscite on crime and criminals and predicted dire consequences to society as a whole if leniency were to be shown; *State v. Lee*, 340 So.2d 190 (La. 1976) where the prosecutor urged the jury to consider the danger to their families if defendant was acquitted; and *State v. Williams*, 345 So.2d 181 (La.1977) where the district attorney pointed to several of the jurors and argued that the crime could have been committed on any one of them.

In none of the three cited cases however, did we reverse based upon the improper argument, which appealed to prejudice. While it was held that the argument was improper and such arguments were by no means to be encouraged, it was also held that the arguments were not so prejudicial as to warrant a reversal.[6] In *State v. Lee*, *supra*, this Court held that "before a verdict approved by the judge is set aside on the ground of improper argument, this Court must be thoroughly convinced that the jury was influenced by the remarks, and that they contributed to the verdict." *See also* C.Cr.P. art. 921.

[14] In the present case, the jury returned its verdict based upon the finding of three aggravating circumstances: (1) that Berry had killed a peace officer who was engaged in his lawful duties at the time he was shot; (2) that the murder was committed during an attempt to commit an armed robbery; and (3) that the defendant created a risk of death or great bodily injury to several other persons who were either in the bank as customers or working there as tellers. All three findings are adequately supported by the evidence (as discussed elsewhere in this opinion). In the overall context of this case, considering all the evidence, including defendant's admission that it was his idea to commit the armed robbery, that a deputy sheriff was intentionally killed during the armed robbery, that several other people's lives were endangered, the minimal mitigating factors and the full arguments of both the state and the defense, we are simply not convinced that the jury was influenced by the remarks. In fact in our view, more likely than not, the argument did not influence the jury in its determination to recommend the death penalty. Accordingly, we do not agree with

6. *State v. Hayes*, *supra*, was reversed, but on different grounds than concern us here.

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the defendant that a substantial violation of his rights has occurred warranting a reversal of his sentence. C.Cr.P. art. 921.

[15] In defendant's supplemental brief in connection with this argument, that the state's closing argument was inflammatory and impermissible, there is presented the further contention that the state's rebuttal argument in the sentencing phase of trial was not confined to answering the argument of defendant as required by C.Cr.P. art. 774 but rather was a comprehensive review of the facts proving aggravation. The argument is without reversible merit for two reasons. Defendant did not object. And the rebuttal argument, admittedly more comprehensive than the state's opening argument, fairly directed itself toward rebutting the defense argument. Defendant had argued that mitigating circumstances were sufficient to offset such aggravating circumstances as were in fact proven; the prosecution took issue with that and harped on the full extent to which those circumstances were aggravated, and in fact proven.

These assignments of error are, therefore, without merit.

ASSIGNMENT OF ERROR NO. 10

By this assignment of error defendant argues that he should have been granted a new trial because of tactical errors by defense counsel which deprived defendant of a fair trial. Counsel argues that he failed to present a coherent picture of the offense to the jury. Such allegations are not supported by the record.

[16] Defense counsel cross-examined state's witnesses in detail regarding the offense and emphasized inconsistency or uncertainty on the part of the witnesses. Due to the great weight of the evidence against defendant, counsel properly pursued issues which would mitigate and reduce the verdict. The trial court found no merit in this argument due to counsel's competent performance at trial and we find no indication that the trial court abused its discretion in this ruling.

This assignment of error is without merit.

SENTENCE REVIEW

Under C.Cr.P. art. 905.9 this Court is required to review every sentence of death for excessiveness. That article mandates that this Court "establish such procedures as are necessary to satisfy constitutional criteria for review."

"Every sentence of death shall be reviewed by this Court to determine if it is excessive. In determining whether the sentence is excessive the Court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

These sentence review guidelines are the same as those authorized by the Georgia statute and approved by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d (1976).

[17] We have reviewed the entire record and have not found any indication that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. Both the defendant and the victim were white, members of defendant's race were represented on the jury, and race was not an issue at the trial. While the state's remarks in closing argument bordered on impropriety, as discussed herein, we do not find that they were of such a nature as to arouse the jurors' passion and inject an arbitrary factor into the sentencing determination.

The jury found three aggravating circumstances:

(a) that the murder was committed during the attempted perpetration of an armed robbery;

(b) that the victim was a peace officer engaged in his lawful duties; and

(c) that the offender knowingly created a risk of death or great bodily harm to more than one person.

[18] The evidence clearly supports all three findings. Defendant admitted at trial that he entered the bank with his gun drawn intending to rob the bank. There was uncontested evidence that the victim was a uniformed Jefferson Parish Sheriff's Deputy attempting to prevent a felony at the time he was shot (*See* Assignment of Error No. 6 above). And finally, there is testimony that there were seven to ten customers in the bank when the defendant entered the bank with his fifteen round "automatic" pistol drawn. Several of the customers, who had to duck, were in close proximity to the deputy when defendant fired three shots at him. The defendant himself testified, although perhaps not fully accurately, that with the weapon he was using it was difficult to control how many shots fired. The evidence clearly supports the finding of all three of the aggravating factors found by the jury.

In compliance with Supreme Court Rule 28 § 3, a post sentence investigation report was completed and included in the record. Defendant was twenty-two years old at the time of the offense. Defendant did well in school but eventually dropped out of school in the tenth grade. He entered the military at age seventeen. He reportedly first met his accomplice in the instant offense, David Pennington, while in the service. Defendant had disciplinary problems in the service and was placed in a drug abuse treatment program prior to receiving an undesirable discharge in 1973. Following his discharge, defendant apparently remained in Louisiana working numerous jobs primarily as a laborer.

Defendant's criminal history consists of four prior arrests for nonviolent offenses, with a conviction for simple burglary. At the time of the instant offense defendant was on probation for his 1976 simple burglary conviction. Defendant has a history of drug abuse. Although defendant saw a psychiatrist while in the service, a psychiatric evaluation conducted for the uniform capital sentence report found defendant in good mental condition.

[19] The information contained in the sentence investigation report, along with other factors, is to be considered in this Court's determination of whether the death sentence in this case "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

[20] Four cases of first degree murder charges in Jefferson Parish were provided for comparison with the present case.[8] None of these four cases resulted in the death penalty. However, none was as serious as the present case. While *State v. Marse*, 365 So.2d 1319 (La.1978) involved the shooting of a police officer, it was under circumstances warranting only a manslaughter conviction which the jury returned. In *State v. Love*, Jefferson No. 79-774, and *State v. Riggins*, Jefferson No. 77-1334, which resulted in first degree murder convictions and only life sentences, it appears that the defendants killed their victims during armed robberies. However, none of the other cases involved the killing of a police officer during an armed robbery while creating a risk of death or serious injury to several people. This case is distinguishable from the four cases provided for comparison as it is more serious in the aggravating circumstances involved. There are no mitigating factors here and the de-

8. This Court's rules (Rule 28) require the district attorney, in every case where the death penalty has been imposed, to file a list of each first degree murder case in the district in which the sentence was imposed after January 1, 1976 to enable this Court to review the imposed sentence for proportionality with other cases. This local comparison scheme has been upheld against constitutional attack notwithstanding a contrary view by at least one member of this Court. *See State v. Baldwin*, 388 So.2d 664 (La.1980), Justice Dennis concurring.

In any event, this defendant, considering the three aggravating circumstances attendant with this case and the fact that a death sentence has not heretofore been recommended in Jefferson Parish, would not likely be aided by comparison for proportionality somewhat rather than parishwide.

fendant himself testified that the armed robbery was his idea, not that of his accomplice. In view of the above, we do not find that the sentence imposed herein "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Decree

For the reasons outlined above, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

DENNIS, J., dissents with reasons.

BLANCHE, J., recused.

ON APPLICATION FOR REHEARING

PER CURIAM.

On application for rehearing we considered defendant's argument that the prosecutor's reference in closing argument to the fact that the capital sentencing statute requires the Supreme Court to review every death sentence constituted prosecutorial misconduct and reversible error.

[21] Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated.

[22] But virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility.[1] The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.

[23] In the present case the prosecutor, in rebuttal during closing argument, reviewed in detail the capital sentencing statute. He discussed each aggravating circumstance listed in C.Cr.P. art. 905.4, pointing out the applicability or inapplicability to the present case, and then reviewed each mitigating circumstance listed in C.Cr.P. art. 905.5, pointing out that none had even been argued by the defense. Finally, conceding that this is not a "measuring contest", he stated that the presence of aggravating circumstances and absence of mitigating circumstances did not compel imposition of the death penalty, but that the enumerated circumstances were simply considerations listed by the Legislature to guide jurors in determining their recommendation.

Continuing his commentary on the fairness of the legislative scheme, the prosecutor stressed that the statute provided every possible safeguard against arbitrary imposition of death sentences, pointing out that the district attorney, the trial judge, the jury, and the Supreme Court must all agree that the death penalty is appropriate in the particular case.

Thus, the import of the closing argument was to tell the jury (1) that the statutory scheme, recognizing the seriousness of the consequences, provided adequate safeguards against arbitrary imposition of the death sentence, and (2) that weighing of all the considerations enumerated in the statute warranted imposition in this case. The argument did not serve to lessen the significance of the jury's role in the overall scheme.

1. Judicial restraint is particularly important in the area of absolute and inflexible prohibitions, since such rules are inconsistent with the very nature of the judicial process. Moreover, when an absolute prohibition is adopted, as the Legislature did in C.Cr.P. art. 770's prohibition against commenting on the defendant's failure to testify, the court must decide in each case whether the remark constitutes a prohibited comment. See, for example, *State v. Fullilove*, 389 So.2d 1382 (La.1980).

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BLANCHE, J., recused.

CALOGERO, J., would grant rehearing and assigns reasons.

FEDEROFF, J. Ad Hoc, would grant rehearing.

DENNIS, J., would grant rehearing for reasons assigned by him in his dissenting opinion and for reasons assigned by CALOGERO, J.

CALOGERO, Justice, dissenting to denial of rehearing.

I dissent from the majority's action refusing to grant a rehearing in this case.

The amicus rehearing application raises an issue not previously treated, that is, whether it was reversible error for the district attorney, in closing argument of the sentencing phase of the bifurcated trial, to tell the jury that the Louisiana Supreme Court will review, for excessiveness, a death penalty the jury should deem appropriate to impose. Although this issue was raised in the amicus brief on original hearing, it was not assigned as error or argued in defendant's brief, and was, therefore, not addressed originally. For the reasons which follow, I believe the issue raised is sufficiently important to warrant granting the rehearing to enable defendant to brief and argue the issue before the Court.

By virtue of the directive contained in C.Cr.P. art. 905.9,[1] as amended in 1976, this Court adopted Supreme Court Rule 28, § 1 which establishes the following review guidelines in cases where the death penalty is imposed:

> "Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Under these review guidelines, this Court is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by any arbitrary factor. It is argued that the prosecutor's comments to the jury concerning appellate review of the case introduced an inappropriate and irrelevant consideration for a jury charged with determining the appropriate sentence to be imposed based on the facts of the case, and therefore, was an arbitrary factor which improperly influenced the jury verdict.

The following comment was made by the prosecutor, on rebuttal, in closing argument *of the sentencing phase of* defendant's trial:

> "There is another provision of the act which says that the Supreme Court of Louisiana shall review every sentencing of death to determine if it is excessive. Every possible safeguard where a defendant for whom the jury is decided, who the D.A. has decided, who the Judge has decided, who shall be sentenced to death shall go to the ultimate court of this state, and they will also determine, is that sentence excessive, was the jury vulnerous [sic] when they reached their verdict."

Although these remarks were immediately followed by the trial judge's charge to the jury on the law, the judge made no statement to the jury that the remarks should be disregarded, nor did he instruct the jury as to the precise law under which the Supreme Court reviews death sentences. The question for our determination is whether these comments by the prosecutor introduced an arbitrary factor into the jury's considerations which may have influenced the sentence imposed.

This question, the effect of informing the jury of appellate review of their verdict,

[1] C.Cr.P. art. 905.9 provides:

> "The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

has c been addressed by this Court on one p...r occasion, in *State v. Myles*, 389 So.2d 12 (La.1980). In *Myles*, the following comments were made by the prosecutor in his opening statement:

"Now, regardless of any verdict that you bring in, and if your verdict is subject to review, both as to guilt and as to sentence, by the Louisiana Supreme Court, this is only true in capital cases. It's the only case that the Louisiana Supreme Court can review the sentence as to whether it's correct or not. Of course, your verdict will also be subject to review in the United States Supreme Court. Therefore, although there's a heavy burden on you in a death sentence case, the burden is no heavier on you than it is on the prosecutor of the State of Louisiana or any of the other courts that have to review your verdict."

The majority, in an attempt to distinguish this case from similar cases in other jurisdictions which hold that such remarks are so prejudicial as to require reversal, held that the remarks here were not intended to encourage the jury to shirk its responsibility. The Court found that the statements were essentially correct, that the prosecutor did not indicate that the jury's determination was any less important because it would be reviewed, and the comments were merely "to express the shared responsibility of the components of the judicial system." Since *Myles* was reversed on rehearing the issue is unresolved jurisprudentially and a full examination of this important issue is in order.

The overwhelming consensus of cases from other jurisdictions is to the effect that "[c]omments by the prosecuting attorney in his argument to the jury on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of evidence, are calculated to induce the jury to disregard their responsibility, and are improper." 75 Am.Jur.2d § 250, p. 368. A contrary case, *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958), held that although such re...rks may have been improper, they did not prejudice the defendant in that case.

In *People v. Ward*, supra, the prosecutor, in attempting to introduce some photographs into evidence stated, "not only is it material from the standpoint of identifying the body, of course, although we have the stipulation here, we have the appellate courts to go through whenever we have so--." At that point the prosecutor was interrupted by defense objection which was sustained. The court held that, under the facts of the particular case, defendant was not prejudiced by the remarks although they may have been improper. It should be noted, however, that this was a 1958 decision and prior to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Of the other cases reviewed, all death cases and all post *Furman* except one, it was consistently held that comments about appellate review of the verdict constituted reversible error. In some cases the objectionable comments came during the sentencing phase of the bifurcated trial. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d [illegible] (1977); *Hawes v. State*, 240 Ga. 327, [illegible] S.E.2d 630 (1977); *State v. Jones*, 298 N.[illegible] 495, 251 S.E.2d 425 (1979), in some cases they came during the regular trial in [illegible]ing arguments, *State v. Gilbert*, 258 S.E.2d 880 (S.C.1979), and in at least one case the comments came while the prosecutor was questioning prospective jurors, *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465 (1940). One case concerned statements made by the prosecutor to the judge but they were made in the presence of the jury. *Prevatte v. State*, 214 S.E.2d 365 (1975). In all the above cases, the courts held that either informing the jury directly that their verdicts would be reviewed by an appellate court or making comment to that effect to the judge, in the jury's presence, was prejudicial and required reversal of the conviction and/or sentence.

In all the cases, the reason given for reversal was essentially the same, a general fear that such information has the effect of decreasing the responsibility the jury takes

the verdict.[2] In *Provatte v. State*, *supra*, the case cited most often as authority on this issue, the court held, "[A] reference by the prosecutor to the defendant's right to appeal is more likely to be considered reversible error if a death penalty is subsequently imposed, no doubt for the reason that, *in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements to impose some severe punishment than their unbiased judgment would have given.*" (Emphasis added.) In these cases, the courts have not looked to the intent of the prosecutor in making the statements, nor have they looked at the context in which they were made. Rather, they have simply held that because such statements tend to have the effect of diminishing the jury's sense of responsibility for their verdict, and because it is so difficult to know what influenced the jury in returning the verdict they return, when the death sentence is returned after such statements, reversal is required.

In *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), the court held that references to parole statutes, appeals, executive commutation or any other matters which are subsequent to the trial have no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence, and introduce an arbitrary factor into the jury's considerations. While we have not imposed such an absolute prohibition,[3] I nevertheless believe this issue is sufficiently important to warrant granting the rehearing and giving defendant an opportunity to argue this issue before the Court before his death penalty is finally affirmed. For the foregoing reasons, I dissent from the *per curiam* denial of rehearing.

2. The following are excerpts from some of the cases:

"The inevitable effect of the prosecutor's remarks to the judge in the jury's presence was to encourage the jury to attach diminished consequence to their verdict, and to take less than full responsibility for their awesome task of determining life or death for the prisoners before them." *Provatte v. State*, *supra*. Such remarks "suggested to the jury that its responsibility for deciding appellant's fate was lessened. It was erroneous and extremely prejudicial for the solicitor to imply to the jury that her finality could be passed on to a higher court." *State v. Gilbert*, *supra*. "[R]emarks by a prosecutor about appellate safeguards suggest to the jury that it may pass the responsibility for a death sentence on to a higher court, and require reversal of the sentence. *State v. Tyner*, 268 S.E.2d 500 (S.C.1979). "Nothing can be permitted to weaken the jurors' sense of obligation to the performance of their duties." *People v. Johnson*, *supra*. "[R]emoving the jury of the existence of an appellate tribunal to which the case with which they were then charged might be carried up, if the evidence offered by the prisoner had been wrongfully withheld however well intentioned, was calculated, nevertheless, to lessen their sense of their own responsibility. Such statements constitute prejudicial error in cases in which a verdict of guilty exposes the accused to the death penalty." *Provatte v. State*, *supra*.

3. In *State v. Sumner*, 379 So.2d 1338 (La.1980) this Court looked at the effect of reading to the jury the law on parole or work release. While the Court reversed defendant's sentence, finding that the jury may have been misled because they were not given complete information, the Court did not take the position that such information was irrelevant to the jury's considerations. However, that argument was not raised in that case.

STATE of Louisiana

v.

Freddie J. GIBSON, Jr.

No. 66027.

Supreme Court of Louisiana.

Nov. 10, 1980.

Defendant was convicted before the Twenty Fourth Judicial District Court, Parish of Jefferson, Frank V. Zaccaria, J., of armed robbery, and he appealed. The Supreme Court, Dennis, J., held that: (1) seizure of defendant's jacket by police officials

APPENDIX "H"

DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT TO REVIEW ITS AFFIRMANCE OF PETITIONER'S ORIGINAL CONVICTION AND SENTENCE. JUSTICE STEWART WOULD GRANT CERTIORARI, REPORTED IN 45 U.S.1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981)

(CONSISTING OF 1 PAGE NUMBERED 98)

APPENDIX "I"
STIPULATIONS
(CONSISTING OF 1 PAGE,
NUMBERED '00)

Stipulation #

FILED – October 25, 1978 Pete Fitzgerald

① That the defendant went to the Metairie Bank on the morning of 1-30-78 with the intent of committing an armed robbery.

② That after entering the Bank the defendant fired three shots, two of which struck and killed Dep. Robert Cochran.

③ That Dep. Cochran did fire one shot with service revolver which shot struck the defendant

④ A spent pellet was removed from the defendant and if Tech. Ron Singer would testify he would testify that the pellet recovered from the defendant was fired by Dep. Cochran's service revolver.

⑤ That the detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Tech. Singer would testify that this pellet was fired by the same pistol which fired the pellets recovered from Deputy Cochran's body.

[signature] AUSA

Fred A. Blancke III, Defense Counsel

Boren Federal Cmp

⑦

[redacted]

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
DEC 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

(3)

NO: 85-5446

BENJAMIN A. BERRY,
PETITIONER

VERSUS

LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

WILLIAM GUSTE, JR
Attorney General
State of Louisiana

BARBARA M. RUTLEDGE
Assistant Attorney General
State of Louisiana

JOHN M. MAMOULIDES
District Attorney
24th Judicial District Court
State of Louisiana

DOROTHY A. PENDERGAST
Assistant District Attorney
24th Judicial District Court
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053

WILLIAM C. CREDO, III
Assistant District Attorney
24th Judicial District Court
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053
Telephone: (504) 368-1020

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO: 85-5446

BENJAMIN A. BERRY,
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VERSUS

LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

OPINIONS BELOW

The original state appeal of the Petitioner's first degree murder conviction and death sentence is reported as State v. Berry, 391 So.2d 406 (La. 1980).

The denial of a writ of certiorari by the United States Supreme Court is reported as Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

The denial of habeas relief after a state evidentiary hearing and appeal thereof is reported as State v. Berry, 430 So.2d 1005 (La. 1983).

The denial of habeas relief after a federal evidentiary hearing and appeal thereof is reported as Berry v. King, 765 F.2d 451 (5th Cir, 1985).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The issues presented in the instant certiorari petition are:

1. Whether Petitioner was denied the effective assistance of counsel at trial;

2. Whether Petitioner's conviction must be overturned based on juror bias.

STATEMENT OF THE FACTS

(Taken from State v. Berry, 391 So.2d 406 (La. 1980))

The trial revealed the following facts concerning the offense. On January 30, 1978, Benjamin Berry and one David Pennington decided to rob the Metairie Road branch of the Metairie Bank and Trust Company. The pair drove from their apartment in Baton Rouge to the bank in Jefferson Parish. They arrived at approximately 10:00 a.m.. Pennington entered the bank alone to look around, more specifically to see if the tellers had much cash. Pennington returned to the truck where the defendant was waiting and advised him of his findings. It is disputed whether or not Pennington told defendant that there was an armed guard inside the bank. Defendant contends that Pennington did not so inform him, but Officer Lamia testified that defendant had made a statement and told him that he did know there was an armed guard in the bank before he entered. In any event Berry decided to proceed with the robbery. While Pennington waited in the truck, Berry entered the bank, with seven to ten customers inside, with his fifteen round, nine millimeter, "automatic" pistol drawn. The guard, a Jefferson Parish Sheriff's Deputy working a paid security detail, exchanged fire with defendant and was fatally wounded. Berry fired three shots, two hit the officer and one hit the wall about three feet above the floor. The officer fired one shot wounding Berry. Defendant immediately fled from the bank after the shooting and the pair returned to Baton Rouge. Berry was later arrested after entering a Baton Rouge hospital for treatment. Berry was charged with first degree murder. At the trial, Berry argued that he did not have the requisite intent to kill the victim but rather that he shot impulsively in self defense, after being fired upon. The state countered this argument by introducing testimony to the effect that Berry shot first and also fired the fatal shot at close range after the victim had dropped his gun upon first being hit.[1]

---

[1] The jury apparently believed the state's version of the facts, finding that Berry did intentionally shoot the deputy sheriff, since they returned a guilty verdict and since "intent to kill or commit great bodily harm" is an element of the crime of first degree murder. From our own review of the record, we feel that the evidence supports this finding by the jury.

ARGUMENT NO. I

WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

In his first ground before this Court, Petitioner wishes to invoke this Court's review on an allegation of ineffective counsel asserted to be of constitutional magnitude.

Specific allegations put forth include an allegation that trial counsel used drugs, failed to adequately investigate and prepare an adequate defense for both the innocence/guilt phase and penalty phase of the trial, stipulated the guilt of the defendant and failed to even put on Petitioner's mother as a witness during the penalty phase of the trial.

Hence, Petitioner claims that because of counsel's drug addiction his trial counsel failed to adequately prepare his defense and furthermore, his trial counsel made a very bare argument for the life of Petitioner during the penalty phase of his trial.

To cite the often repeated performance/prejudice standard used in evaluating all claims of constitutionally ineffective counsel, Strickland v. Washington, ____ U. S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) states:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. 104 S.Ct.at 2064, 80 L.Ed.2d at 693.

Judicial scrutiny of counsel's performance must be highly deferential . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." Id. at 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the case. Id. at ____, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

The above statements by this Honorable Court form the crux of all or almost all death penalty litigation in the United States.

Decided on the same day, United States v. Cronic, ____ U. S. ____, 104 S.Ct. 2039 80 L.Ed.2d 657 (1984) teaches us that the Court has also found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. Apart from circumstances of that magnitude however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

Considering the record as a whole, the determination to be made in this case is a Strickland one; Cronic is not applicable. Thus, Berry must show specific errors which undermine confidence in his conviction and sentence.

The thrust of Petitioner's argument is twofold.

First, Petitioner alleges that his trial counsel's "use of drugs" or "drug addiction" prevented him from adequately preparing and presenting a defense, both in the innocence/guilt phase and the penalty phase.

While it is true from the record that Mr. Blanche did not subpoena any witnesses for trial, the lengthy passage of time has not enabled Petitioner to provide the names of any witnesses who should have been called, either in the guilt or penalty phase. Furthermore, complaints of an uncalled witness in an effort to demonstrate ineffectiveness are not favored in federal habeas review. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984); Boyd v. Estelle, 661 F.2d 388, 389 (5th Cir. 1981). Moreover, Petitioner must overcome a strong presumption that his counsel's decision in not calling a witness was a strategic one. Murray, supra.

Testimony in both the state and federal evidentiary hearings shows that Mr. Blanche did interview witnesses. Unfortunately, any witness who could supply anything good about Petitioner would have had to admit the bad facts which Petitioner now downplays. Even assuming that the failure to find out about **Ruth East** was a deficiency in Mr. Blanche's investigation, her testimony, brought forth at the state evidentiary hearing, could not possibly have had the impact suggested by Petitioner. See State v. Berry, 430 So.2d at 1011.

Again, the Strickland prong of prejudice is lacking.

In sum, the trial attorney, after investigation, came to the reasonable conclusion that there were no witnesses who could help his client. State v. Berry, 430 So.2d at 1012. Even the passage of time (seven years) has not allowed Mr. Berry to change this. The Sixth Amendment does not require that counsel do what is impossible or unethical; if there is no bona fide defense to a charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. U. S. v. Cronic, id.

In line with the above, another area of complaint relative to ineffective assistance is the alleged failure to call witnesses in the penalty phase. As stated above, the arguments of Petitioner are similar with one twist--Petitioner's mother.

The record clearly shows that Mrs. Berry was placed on the stand in the penalty phase but was overcome by emotion and unable to testify. Despite Berry's request to have his mother removed (Fed. Evid. Transcript, p. 35), Mr. Blanche placed her on the first row of the courtroom so that she would be the last thing the jurors saw before their deliberation. Petitioner's allegation in his brief contending that the above conveyed to the jury that Petitioner's mother would not testify is absurd and unfounded. Instead, it is clear evidence of a good trial attorney using everything he has in court to his client's best advantage.

It has been held that counsel's failure, at the penalty phase of a Louisiana capital case, to put on evidence through defendant's relatives, friends and employers as to defendant's affection for his family and friends, their affection for him, defendant's willingness to work hard and his conscientiousness and dependability and nonviolent disposition, as well as IQ evidence, did not so prejudice defendant as to violate a constitutional right to assistance of counsel. See Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984); (Slip opinion No. 84-4745); Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984).

Accordingly, there is no merit to this allegation.

The most major area of complaint by Petitioner relative to ineffective representation is the allegation that Petitioner's trial attorney used illegal drugs during the representation of Mr. Berry.

Benjamin Berry himself summed it up when he testified at his first evidentiary hearing: he didn't care what was done at trial and, that's why he didn't testify. Yet here, nowhere does he mention on direct or cross examination that his attorney was on illegal drugs during his trial. Although he admits that he received an undesirable discharge from the service and did time in military jail for his drug and A.W.O.L. problems, he, knowing the effects of drugs, oddly chooses not to tell the court about his observations of drug use

by his counsel during his trial. He remembers his counsel drunk at one interview yet fails to even mention anything about this allegation in his testimony.

Instead, he at best shows that on one night during the trial, his counsel spent the night at a friend's house with Winn Dyer, another friend. Upon her return, Mary Beth Alice (Blanche's friend) noticed a disarray of pills near her bathroom. She then yelled at Winn Dyer for making a mess. Mr. Blanche was asleep. The next morning she failed to mention the episode to Mr. Blanche and drove him to his destination. His actions at all times appeared normal. (Fed. Evid. Transcript, pp. 73-80).

QUITE SIMPLY, THIS IS ALL THAT WAS SHOWN. AT NO TIME DID ANYONE EVER SHOW ANY DRUG USE BY MR. BLANCHE AT ANY TIME DURING HIS REPRESENTATION OF MR. BERRY, EITHER AT TRIAL OR ON DIRECT APPEAL TO THE LOUISIANA SUPREME COURT OR THE UNITED STATES SUPREME COURT.

Stacked against this allegation are drug records of Mr. Blanche from 1977 until 1982 which indicate that he never failed a urine test for drugs. Also, witnesses to the original trial including the trial judge, the original prosecutor, an attorney for a co-defendant (Jay Zainey representing Donald Pennington) and even a newspaper reporter who covered the original trial all indicate that Mr. Blanche did an excellent job in his defense, one which is a credit to the legal profession. The record clearly supports this.

Thus, as a finding of fact, the State judge found the allegation of drug use by trial counsel unfounded after an evidentiary hearing.

This finding is entitled to a presumption of correctness. 28 U.S.C. 2254(d); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1982); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Marshall v. Lonberger, ____ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); Asper v. Estelle, 709 F.2d 356 (5th Cir. 1983); Germandy v. Estelle, 639 F.2d 1301 (5th Cir. 1981). To overcome the § 2254 presumption, Petitioner must show one of the exceptions listed in § 2254(d). Daigre v. Maggio, 705 F.2d 786, 789 (5th Cir. 1983); Williford v. Estelle, 672 F.2d 552, 553 (5th Cir. 1982). Petitioner here does not urge any particular exception. Nor does a reading of his argument indicate that any of the factors is actually present. The trial judge's reasons are clear and there is ample evidence in the record to support his conclusions. The State respectfully submits that Petitioner has not overcome the § 2254 presumption.

Thus, the State respectfully submits that no new findings of fact can be reached in the federal evidentiary hearing absent a specific finding of exception under 28 U.S.C.A. 2254(d).

Furthermore, the federal district court has affirmed the finding of fact by the state court.

Findings of fact by the district court in habeas corpus cases will not be set aside unless they are clearly erroneous. Fed.R.Civ.P. 52(a); Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 700 (1984); Gomez v. McKaskle, 734 F.2d 1107, 1109 (5th Cir. 1984); Hernandez v. Estelle, 674 F.2d 313, 315 (5th Cir. 1981); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972).

In addition to the above, the Strickland prong of prejudice has not been met in this regard.

In light of the above, the State must respectfully disagree with the three judge panel's conclusion that the use of drugs during Petitioner's trial was far from settled in either the state or federal evidentiary hearing. Were that even remotely possible, Cronic might be applied.

The second and major thrust of Petitioner's ineffective counsel allegation is a stipulation made by counsel at trial.

Berry's contention is that his trial counsel stipulated to the functional equivalent of a plea of guilty without his consent.

As is plainly evident from the record, this stipulation did not include an essential element of the crime, specific intent to kill. It is clear that this was to be the defense throughout the trial in both phases. Thus, the stipulation was clearly a strategic choice designed to weaken the effect of the most damaging evidence against Berry while allowing him the chance to say he (Berry) didn't shoot first, his only real chance if he had one at all.

Thus, Berry has further failed to identify any prejudice resulting from the stipulation. The record as a whole supports the true nature of the adversarial process at work.

Berry's further assertion that a conflict in this area exists between the Fifth and Sixth and Eleventh Circuits is equally without merit.

Berry cites Francis v. Spraggins, 720 F.2d 1190 (CA11, 1983) and Wiley v. Sowders 647 F.2d 642 (CA6, 1981) as the major support for this premise.

The clear distinction between Berry and the above cases is the stipulation of every element charged in Francis and Wiley and the failure to stipulate specific intent, an element of the crime, in Berry's case. Both counsel in Francis and Wiley made stipulations admitting every element of the ccrime charged in the hopes that they could make a credible argument for the life of the accused. The State respectfully suggests

that because the rulings in the Francis and Wiley cases are essentially factual determinations no "conflict" actually exists between any of the federal circuits. The decisions in the cited cases turn on the effects of the stipulations involved; the decisions cited are "fact bound" in the strictest sense. The State respectfully suggests that mere variations in the results of applications of Strickland do not amount to a "conflict" between the courts of appeal.

On the other hand, Berry's counsel did not stipulate every element (specifically specific intent) so that he could perhaps raise enough doubt in one juror's mind as to who fired first and thereby make an effective plea for Berry's life. Counsel's failure in no way indicates a lack of strategy or effort. Rather, it indicates a plan carried out so that the jury could see everything it could about Berry and his crime and make its judgment accordingly.

In sum, Petitioner has shown no element of his trial counsel's peformance that fell below the constitutional requirement of the Sixth Amendment.

ARGUMENT NO. 2

WHETHER PETITIONER'S CONVICTION MUST BE OVERTURNED BASED ON JUROR BIAS

As his final ground for a stay of execution Petitioner asserts that his conviction is unconstitutional because Louisiana procedure allows a capital defendant to be tried before a "guilt prone" jury. Petitioner argues that procedures which allow the prosecution to excuse death penalty opponents from service at the guilt phase of trial deprive the capital defendant of an impartial jury: Petitioner argues that a "death qualified" jury is predisposed to return a guilty verdict. The State respectfully suggests that Petitioner does not merit relief based on this claim. Because Petitioner has not developed any evidence in support of his claim Petitioner should not be allowed to appeal this issue.

The State first respectfully suggests that Petitioner is barred from raising this claim in these proceedings for the following reasons. The practice of "death qualifying" juries was originally approved by the Supreme Court. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). More recently however, the Eighth Circuit has found merit to the theory that "death qualified" juries are disproportionately prone to convict at the guilt phase of trial. See Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). A petitioner seeking relief based on this sort of claim, however, has the burden of showing that jurors have been excluded from service based on a Witherspoon-type objection and that the effect of excluding such jurors has been to deprive the petitioner of a fair trial. Sonnier

v. Maggio, 720 F.2d 401, 404 (5th Cir. 1983) (necessity of presenting "factual particulars"). Petitioner has failed to produce any evidence in support of this claim for relief. Petitioner did not produce any evidence whatsoever in support of his proposition that "death qualification" procedures result in a biased jury at the guilt phase of trial. Petitioner did not present either documentation or expert testimony in support of this contention at the district court hearing.

Petitioner has also failed to show that "death qualified" juries are unreliable arbiters of guilt by his failure to put any evidence on these issues before the district court. The State therefore respectfully suggests that Petitioner has abandoned this claim. Sellers v. Smith, 412 F.2d 1002, 1004 (1969). Petitioner should not now be able to raise this claim. Moreover, the State respectfully suggests that, even had this issue been properly developed, Petitioner has not shown that he is entitled to relief based on this claim.

The Fifth Circuit has consistently denied relief to applicants urging this claim. Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); Willie v. Maggio, 737 F.2d 1372, 1385 (5th Cir. 1984); Smith v. Balckom, 660 F.2d 573 (5th Cir. Unit B 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). It has recently held that the decision to institute a bifurcated jury for capital cases is one strictly within the legislative purview. Knighton v. Maggio, 740 F.2d 1344, 1351 (5th Cir. 1984). Further, though Petitioner points to a judicial decision implementing such a rule, the Grigsby rule is so far the only such one. The requirement of a bifurcated jury has recently been rejected in two other federal circuits. See Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); McClesky v. Kemp, 753 F.2d 877, 901 (11th Cir. 1985). Hence, any Grisby type claim Petitioner may have is without merit.

Furthermore, Petitioner is not only not entitled to relief but also not entitled to a stay since the State used fewer than its allowed number of peremptory challenges, contrary to the conclusions found in the Louisiana Supreme Court Opinion State v. Berry, 391 So.2d 406 (La.1980) and the Fifth Circuit Opinion Berry v. King, 768 F.2d 451 (1985).

The minute entry from the voir dire, Exhibit A, lists eight prospective jurors as peremptorily challenged by the State. The transcript of the voir dire (Exhibit B) supports that these jurors were indeed challenged although the reasons for the challenges are often vague. But after the voir dire was completed the judge excused the sworn jurors and noted for the record the basis for the challenges:

> "For the record, counsel and the Court agreed to allow the reasons for the challenges to be done privately at the bench, but the court has permitted the challenges of Mr. Donahue, Mr. Forest, Mr. Ferrand, Miss McMillan, Miss

Lyons, Miss Burks, and Mr. Schiro to be for cause in view of the Witherspoon ruling. The other challenges were peremptory."

(Voir Dire Transcript, page 143)

The transcript of the voir dire supports the fact that each of these jurors qualified as a Witherspoon excludables (although the minute entry for Helen McMillan lists her as a peremptory challenge the record supports the judge's statement that she was excluded for cause). Nevertheless, according to the minute entry the State used eight (8) peremptory challenges but according to the judge and the transcript the State only used seven peremptory challenges. Hence, the State had four or five peremptory challenges remaining out of twelve allowed by Louisiana statute. Under La.C.Cr.P. art. 800, the defendant does not have ground for such a complaint if the state uses fewer than the number of peremptory challenges to which it is entitled. State v. Jackson, 450 So.2d 621 (La. 1984). Presumably the jurors challenged for cause as WEs were within reach of peremptory challenges and Petitioner is insulated from any improper influences a death qualified jury may have had on Petitioner's conviction and sentence. Sonnier v. Maggio, 720 F.2d 401, 406 (5th Cir. 1983); Jordan v. Watkins, 681 F.2d 1067, 1070 (5th Cir. 1982). The conviction and sentence of Petitioner are not vulnerable where the maximum number of peremptory challenges was not used or exceeded unless some juror was improperly excused for cause under Witherspoon. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); O'Bryan v. Estelle, 714 F.2d 365, 371 (5th Cir. 1983); Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979). A review of the transcript in this case reveals that no juror was improperly excused for cause based on an objection to the death penalty. The State suggests that Petitioner's conviction and sentence should not be reversed based on this ground.

The State finally suggests that Petitioner does not merit a stay of execution based on this ground for relief. As noted above, Petitioner has not shown that he is entitled to relief. Further, the decision by the United States Supreme Court to review this issue does not require that Petitioner be granted a stay automatically. See Witt v. Wainwright, 53 U.S.L.W. 3647 (11th Cir. 1985).

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AND THAT A STAY OF EXECUTION SHOULD NOT BE GRANTED.

Respectfully Submitted,

WILLIAM GUSTE, JR
Attorney General
State of Louisiana

BARBARA M. RUTLEDGE
Assistant Attorney General
State of Louisiana

JOHN M. MAMOULIDES
District Attorney
24th Judicial District Court
State of Louisiana

DOROTHY A. PENDERGAST
Assistant District Attorney
24th Judicial District Court
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053

William C. Credo III

WILLIAM C. CREDO, III
Assistant District Attorney
24th Judicial District Court
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053
Telephone: (504) 368-1020

CERTIFICATE

I, William C. Credo, III, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of December, 1985, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On Petitioner, Benjamin Berry, through his counsel of record, Samuel DAlton, 2001 Jefferson Highway, Jefferson, Louisiana 70121.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

William C. Credo III
WILLIAM C. CREDO, III

EXHIBIT "A"

DISTRICT COURT MINUTES

JURY SELECTION

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

vs. No. 78-2151

BENJAMIN A. BERRY Division "B"

Date 10-24-78

DISTRICT ATTORNEY G. K. KONRAD / P. C. LEITZ JUDGE F. V. ZACCARIA

THE DEPENDANT BERRY APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE WAS REPRESENTED BY FRED A. BLANCHE, III, ATTORNEY.

THE COURT TOOK UP THE MOTION FOR APPOINTMENT OF A SANITY COMMISSION:

W. --- DR. E. T. FRANK, M.D. (STIPULATION AS TO EXPERTISE IN THE FIELD OF PSYCHIATRY)

MATTER HEARD - ARGUED - SUBMITTED - BY ORDER OF THE COURT, THE MOTION TO APPOINT A FULL-BLOWN SANITY COMMISSION IN THIS MATTER IS DENIED - OBJECTION NOTED BY MR. BLANCHE TO THE COURT'S RULING.

MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE TAKEN UP - ARGUED - SUBMITTED - MOTION DENIED BY THE COURT - OBJECTION NOTED BY MR. BLANCHE TO THE COURT'S RULING.

MR. BLANCHE FILED THIS DAY A MOTION TO RECUSE JUDGE ZACCARIA IN THIS MATTER. THE MOTION TO RECUSE WAS TAKEN UP WITH JUDGE LOUIS G. DESONIER, DIVISION "A" OF THIS COURT, PRESIDING. MOTION TO RECUSE ARGUED - SUBMITTED - DENIED BY THE COURT.

JOINT STIPULATION OF COUNSEL THAT ALL MOTIONS AND ANSWERS OF THE OTHER INDICTMENTS BE INCORPORATED INTO THIS CASE.

AT THE HOUR OF 4:17 P.M. THE COURT TOOK UP MATTER #78-2151
ENTITLED STATE OF LOUISIANA (vs) BENJAMIN A. BERRY
R. S. 14:30 - FIRST DEGREE MURDER
PRESENT WERE:
BENJAMIN A. BERRY - DEFENDANT
FRED A. BLANCHE, III - COUNSEL REPRESENTING THE DEFENDANT
PATRICK C. LEITZ - COUNSEL REPRESENTING THE STATE OF LOUISIANA
GORDON K. KONRAD - CO-COUNSEL REPRESENTING THE STATE OF LOUISIANA

THE JURY SELECTION IN THIS MATTER BEGAN:
STEVEN LEE TAILLOCK - PEREMPTORILY CHALLENGED BY THE DEFENSE
HELEN ALBEANISE TRIGO - A C C E P T E D
PAUL MAROTTE - PEREMPTORILY CHALLENGED BY THE STATE
JERRAL JOSEPH ANDRY - A C C E P T E D
CATHERINE BRUMFIELD RAYMOND - PEREMPTORILY CHALLENGED BY THE DEFENSE
HARRIS MUNROE PERRY - A C C E P T E D
LOUIS MICHAEL DONAHUE - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
ALCIDE JOSEPH TRUDEAUX - PEREMPTORILY CHALLENGED BY THE STATE
MILDRED CLAIRE BISHOP - A C C E P T E D
DORIS CHARLES FORGES - PEREMPTORILY CHALLENGED BY THE STATE
ELIZABETH HOMER BORDELON - A C C E P T E D
ELIZABETH D'ANN ALLEN - A C C E P T E D

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

VS.

BENJAMIN A. BERRY

No. 78-2151

Division "B"

Date 10-24-78

DISTRICT ATTORNEY G. K. KONRAD / P. C. LEITZ JUDGE P. V. ZACCARIA

RICHARD LOGAN TUCKER - A C C E P T E D
PAUL LLOYD PLUSQUELLEC - EXCUSED BY THE COURT FOR CAUSE
FRANCES BEATRICE SOFIA - PEREMPTORILY CHALLENGED BY THE STATE
CAROLYN ANN LAROSE - A C C E P T E D
DOROTHY WILLIAMS - A C C E P T E D
BURTIS DAVID CARTER, SR. - PEREMPTORILY CHALLENGED BY THE STATE
PHILIP MELVIN FERRAND - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
CHARLES RUSSELL TODARO - PEREMPTORILY CHALLENGED BY THE DEFENSE
FRANK WATKINS SHERMAN - A C C E P T E D
SIDNEY JOSEPH FOREST - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
LUVERNE VOS JAMES - CHALLENGED FOR CAUSE BY JOINT CONSENT OF COUNSEL
HELEN MCMILLAN - PEREMPTORILY CHALLENGED BY THE STATE
ELIZABETH LUEHRMANN BUCHANAN - A C C E P T E D
G. T. RINALDI - PEREMPTORILY CHALLENGED BY THE DEFENSE
DORIS K. MUHL - PEREMPTORILY CHALLENGED BY THE STATE
ORELIA JOSEPHINE LYONS - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
WILLIAM A. RHEA, JR. - PEREMPTORILY CHALLENGED BY THE DEFENSE
GEORGIA MARIE WILLIS - PEREMPTORILY CHALLENGED BY THE STATE
VIOLA LEE BURKS - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
FRANK PAUL SCHIRO - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
DANIEL PAUL DUFRENE - A C C E P T E D
ELMER JAMES KINABREW - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
JOHN H. LINK - A C C E P T E D - ALTERNATE JUROR

SELECTED JURORS:
HELEN ALBEANISE TRIGO
JERRAL JOSEPH ANDRY
HARRIS MUNROE PERRY
MILDRED CLAIRE BISHOP
ELIZABETH HOMER BORDELON
ELIZABETH D'ANN ALLEN
RICHARD LOGAN TUCKER
CAROLYN ANN LAROSE
DOROTHY WILLIAMS
FRANK WATKINS SHERMAN
ELIZABETH LUEHRMANN BUCHANAN
DANIEL PAUL DUFRENE
JOHN H. LINK - ALTERNATE

AT THE HOUR OF 7:30 P.M. COURT RECESSED FOR THE DAY. COURT RECESSED UNTIL 9:30 A.M. ON 10-25-78.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

Pete Fitzgerald, Jr.
DEPUTY CLERK

Entry No. 3

EXHIBIT "B"

VOIR DIRE TRANSCRIPT

+29 Vol II & III

bring whatever belongings you need and we'll help you in any way we can. Possibly tomorrow night we expect that by the next day after that the case should be terminated. These are guesses, of course, but don't hold me to it.

I will try to explain to you that are selected the various steps that we take as we go along. After a jury is selected I will give them some of the things that might help them in sitting here and listening to the evidence in the case without me commenting on the evidence. I'm not allowed to do that.

I want you jurors who are not called here to pay attention to the answers and questions that are given because you may be asked those same questions and you might be able to save some time if you know exactly what's going on in the courtroom and what's expected. What we're expecting is to pick a jury that is going to sit in that jury box and give both the State and the defendant a fair trial based on the evidence that is heard and the exhibits that are offered in evidence.

Gentlemen, do you have any particular procedure for selecting the alternate? I'm willing to abide by whatever you want

to do. Shall we select twelve jurors and then select an alternate?

MR. BLANCHE:

Yes, sir.

THE COURT:

All right. Let's call twelve jurors to the stand. As you are called please fill up the front row.

THE CLERK:

Steven Tadlock, Helen Trigo, Paul Marotte, Jerral Andry, Catherine Raymond, Harris Perry, Louis Donahue, Alcide Trudeaux, Mildred Bishop, Doris Forges, Elizabeth Bordelon, Elizabeth Allen.

(Whereupon, the voir dire oath was administered by the Clerk.)

THE COURT:

Ladies and gentlemen, I'm going to introduce you to the people seated at the counsel table. Starting from the man seated nearest to you is Mr. Patrick Leitz, who is an Assistant District Attorney assigned to this division, Mr. Gordon Konrad, who is also an Assistant DA, who also has jurisdiction in this Court. Seated next to Mr. Konrad is the defendant, Benjamin A. Berry. His attorney, Mr. Fred Blanche, III, is seated next to him. The young lady seated next to him

is Mr. Blanche's secretary...assistant.

Do you know anybody seated at the counsel table?

The defendant is accused of a crime of first degree murder, which is alleged to have occurred on January the 30th, 1978 in the Parish of Jefferson, and more specifically in the Metairie Bank. Do you know anything at all about this case? Do any of you know anything that you think I should know? Do you have any preconceived ideas at all about this case or what you should do here in this courtroom? Do you feel that you could sit here and listen to the evidence for the next day... two days and decide the case fairly and impartially based upon the evidence you will hear in the courtroom, and the law as I will instruct you, could you do that?

All right, I'm going to let the attorneys ask you some questions.

BY MR. LEITZ:

Q Mr. Tadlock, how old are you?

A Twenty-one.

Q Are you married?

A No, sir.

Q Where are you employed?

A I work for my brother...Bayou Barge in Marrero.

Q What do you do there?

A I'm manager.

Q How long have you been there?
A We opened up in April.
Q What did you do, sir?
A I was in the U. S. Navy.
Q How long were you in the Navy?
A Two years.
Q How long have you lived in Jefferson Parish?
A Since 1964.
Q Mr. Tadlock, have you or anybody in your family ever been charged with a serious crime?
A No, sir.
Q Mrs. Trigo, how old are you?
A Forty-nine.
Q Are you married?
A Yes.
Q Any children?
A Five children.
Q What's the oldest?
A He's twenty.
Q Does he have any children?
A No.
Q What's the youngest?
A Twelve.
Q Do you work?
A I work part-time at Maison Blanche.
Q How long have you been working there?
A Two years.
Q How long have you lived in Jefferson Parish?
A Nineteen years.

Q Have you or any member of your family been charged with a serious crime?

A No, sir.

Q Have they ever been a victim of a serious crime?

A No.

Q Mr. Marotte, how old are you?

A Thirty-one.

Q Are you married?

A Yes, I am.

Q Any children?

A One little girl four years old.

Q Where are you employed?

A South Central Bell.

Q How long have you been with South Central Bell?

A Thirteen years.

Q How long have you lived in the Parish?

A About seven years.

Q Have you or any member of your family ever been charged with a serious crime?

A Yes, I had a brother that was charged with a crime but I don't even know what it was.

Q Would that factor have any bearing on any decision in this matter?

A None whatsoever.

Q Have you or any member of your family ever been a victim of a serious crime?

A I believe he was convicted.

Q Has anybody been a victim of a crime?

A Oh, a victim, I'm sorry. No.

Q Mr. Andry, how old are you?

A Thirty-eight.

Q Married or single?

A Married.

Q Any children?

A No.

Q Are you employed, sir?

A For Louisiana Power & Light.

Q How long have you been with them?

A About thirteen years.

Q How long have you lived in the Parish?

A Since '69.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have they ever been a victim of a serious crime?

A No.

Q Miss Raymond, how old are you?

A Thirty-seven.

Q Are you married or single?

A Widowed.

Q Any children?

A One.

Q Boy or girl?

A Girl...twenty.

Q Are you employed, ma'am?

A No.

Q How long have you lived in Jefferson Parish?

A Um, twelve years.

Q Have you or any member of your family ever been charged with a ser.ous crime?

A No.

Q Have you ever been a victim?

A Ah, I was in a bank at one time and it was held up.

Q Would that factor have any bearing on your decision in this matter?

A No.

Q Mr. Perry, how old are you?

A Sixty-six.

Q Married?

A Yes, sir.

Q Any children?

A I have two. The boy is married and the girl lives at home.

Q Any grandchildren?

A No, sir.

Q Are you employed, sir?

A No, sir. I'm retired. I retired last year.

Q Where did you retire from?

A From Touro Infirmary.

Q What did you do there?

A I was a foreman painter there.

Q How long were you with Touro?

A Nine and a half years.

Q How many years have you lived in the Parish?

A Twenty-six years.

Q Have you or any member of your family ever been charged with a serious crime?

A No, sir.

Q Have y'all ever been a victim of a serious crime?

A No, sir.

Q Mr. Donahue, how old are you?

A Fifty-four.

Q Are you married or single?

A Married.

Q Any children?

A Five.

Q What's the oldest?

A Thirty-two.

Q What's the youngest?

A Sixteen.

Q Any grandchildren?

A Four.

Q Are you employed, sir?

A Yes, I work for Metairie Ford.

Q What do you do for Metairie Ford?

A I'm a parts man.

Q How long have you been with Metairie Ford, sir?

A About eight years.

Q How long have you lived in the Parish?

A Since 1958.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

Q Mr. Trudeaux...

MR. DONAHUE:...

Wait just a minute. My daughter was attacked by a purse snatcher.

Q Mr. Trudeaux, how old are you?

A Thirty-three.

Q Married or single?

A Married.

Q Any children?

A Four.

Q What are their ages?

A Thirteen, twelve, ten, seven months.

Q Where are you employed at?

A Avondale.

Q What do you do for Avondale?

A I'm a painter.

Q How many years have you been there?

A Two and a half years.

Q How many years have you lived in the Parish?

A All my life.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have they ever been a victim of a serious crime?

A My sister has.

Q What kind of crime was that?

A She has a nightclub and it was robbed.

Q Would the fact that your sister was robbed have any bearing on your decision in this matter?

A No.

Q Miss Bishop, how old are you?

A Fifty-one.

Q Married?

A Yes.

Q Any children?

A Two children. One married, one single.

Q Is your married child a boy or a girl?

A My daughter is married and I have three grandchildren.

Q Are you employed, ma'am?

A No.

Q How long have you lived in the Parish?

A Eighteen years this month.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

Q Miss Forges, what is your age?

A Forty-three.

Q Married or single?

A Married.

Q Any children?

A Yes, six.

Q Six?

A Uh-huh.

Q What's the oldest and the youngest?

A Twenty-three and twelve.

Q The one twenty-three, is that a boy or a girl?
A A boy.
Q Is he married?
A Yes.
Q Are you employed, ma'am?
A Yes, I work part-time as a secretary for Jefferson Parish School Board.
Q How long have you been working for them?
A Three years.
Q How long have you lived in Jefferson Parish?
A Five years.
Q Have you or any member of your family been charged with a serious crime?
A No.
Q Have you ever been a victim of a serious crime?
A No.
Q Miss Bordelon, how old are you?
A Forty-six.
Q Married or single?
A Married.
Q Any children?
A Four sons. And the oldest is married.
Q What is his age, ma'am?
A Twenty-three.
Q Are you employed, ma'am?
A Part-time. I work with my husband.
Q What does he do?
A A retail (inaudible response).
Q How long have you been working with that?

A About eight or nine years.

Q How long have you lived in Jefferson Parish?

A Thirty-eight years.

Q Have you or any member of your family ever been charged with a serious crime before?

A No.

Q You ever been a victim of a serious crime?

A No.

Q Miss Allen, what is your age?

A Twenty-four.

Q Married or single?

A Single.

Q Are you employed?

A Montalbano Advertising.

Q How long have you been with them?

A Four years.

Q How long have you lived in the Parish?

A Twelve years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

MR. LEITZ:

Ladies and gentlemen, I'm going to read to you just exactly what the first degree murder statute is. This is what we're presented here with today.

"First degree murder is the killing of a

human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, or armed robbery; or (2) when the offender has specific intent to kill or to inflict great bodily harm upon a fireman or a peace officer who was engaged in performance of his lawful duties; or (3) when the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder, or is serving a sentence; or (4) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; (5) when the offender has a specific intent to commit murder and has been offered or has received anything of value for commiting the murder.

It says "For the purpose of paragraph 2 herein peace officers shall be defined in and include any consequent sheriff, deputy, local or state policemen, game warden, federal law enforcement officers, jail or prison guards, parole officers, probation officers, judges, district attorneys, assistant district attorneys or attorneys who investigate."

In this matter you will be faced with: First, the proposition where you have to render a verdict of guilty or not guilty, or guilty of a lesser verdict. If you come back with guilty, you have a charge, and you will go out and deliberate on whether or not to give the death sentence. That will be determined by the aggravating circumstances. The following shall be considered aggravating circumstances in this matter: a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; b) the victim was a fire or peace officer engaged in his lawful duties;

MR. BLANCHE:

Your Honor, I believe that Mr. Leitz is reading the wrong statute to the jury.

MR. KONRAD:

These are the mitigating statutes... I mean, the aggravating circumstances under 905.4.

MR. BLANCHE:

Well, when he read the first degree murder...

MR. KONRAD:

These have actually been incorporated.

MR. BLANCHE:

... definition. I think he read it from the part that had not been amended. I believe the first degree murder definition in the '78 pocket part to the criminal code...

THE COURT:

Go off the record.

(Bench discussion.)

THE COURT:

For the record, after a bench conference, Mr. Leitz, you're permitted to instruct the jury on the evidence in the definitions.

MR. LEITZ:

In order for you to convict upon first degree murder; first degree murder is the killing of a human being when the offender has a specific intent to kill or to bring great bodily harm. You also have to find one or more of the following aggravating circumstances; a) the offender was engaged in the perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; b) the victim was a fireman or peace officer engaged in his lawful duty; c) the offender knowingly created a risk of death or great bodily harm to more than one person; d) the offender offered or has been offered or has received or has

given or has received anything of value for the commission of the offense. Given the set of facts that you will be given facts from the witness stand, you will take the law from the Judge. If the State proves to you ... we're not asking you this particular case because you haven't heard the facts and you don't know anything about this particular case...would you be able to come back and give the death sentence if you found the evidence to be and the law according to the Judge, do any of y'all feel that under any circumstances whatsoever you could come back and give the death penalty?

Q Mr. Tadlock?

A I couldn't render the death penalty.

Q Miss Trigo?

A I don't know.

Q You don't know whether under any circumstances you could or you couldn't?

A Ah, depending on the circumstances. The question was "Could I come back and give the death penalty?" I guess it depends on the circumstances.

Q If the State proved to you all of the elements of the crime and proved to you the aggravating circumstances, and you took these aggravating circumstances and weighed them

against the mitigating circumstances given you by the defendant, could you then weigh the decision and come back with a guilty verdict or a death penalty?

A Yes, I believe I could.

Q Mr. Marotte?

A I believe I could.

Q Mr. Andry?

A Yes.

Q Miss Raymond?

A Yes.

Q Mr. Tadlock?

A Yes.

Q Mr. Donahue?

A No.

Q Under no circumstances or whatever the State proved to you and what the law was, you could not render a death sentence?

A No.

Q Mr. Trudeaux?

A (Affirmative response.)

Q Miss Bishop?

A I will try to be as honest as I could, yes.

Q You think that if the circumstances were presented...

A After I heard the circumstances I would try to be fair.

Q Miss Bishop?

A I'm Miss Bishop.

Q I'm sorry. Miss Forges?

A I really don't.

Q Miss Forges, after listening to all of the evidence that's presented and on behalf of the State on any mitigating circumstances given by the defendant or by the defense counsel witnesses, would you be able to take that evidence and apply the law and if you could so render a death penalty?

A I think so.

Q You think so. Miss Bordelon?

A Yes.

Q Miss Allen?

A Yes.

Q Do any of y'all have any problems for giving both the State and the defendant a fair trial?

A (Inaudible response.)

Q Do you know of any medical or physical reason why you cannot serve on this jury and devote your full attention to the evidence presented to you?

MR. ANDRY:

I have epilepsy but it's controlled by medication.

Q Do you think that this would interfere with you sitting here at all?

MR. ANDRY:

As long as I have my medicine.

MR. LEITZ:

I tender the panel.

THE COURT:

To reassure any of you prospective jurors, we try to take your comfort into consideration. If any of you are selected if you would like a short recess, all you have to do is...you don't have to sit there and suffer. We'll try to accommodate you. All right?

You tender the jury at this time?

MR. LEITZ:

We tender the panel.

MR. BLANCHE:

May it please the court, Mr. Leitz, once again, ladies and gentlemen, my name is Fred Blanche. I defend the defendant in this case, Ben Berry. Cheryl is my secretary and a paralegal in my office and will be with me throughout the duration of the selection to be on this jury.

Now, you've been read the definition of first degree murder. I would like to read once again to you the legislative definition of it as I appreciate it. It's found in our criminal code, paragraph 30. It's very simple...at least at first glance. It says: "First degree murder is the killing of a human being when the

offender has a specific intent to kill or to inflict great bodily harm." There is a second section of that statute. It states that whoever permits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. That last clause is very important because the outcome of this case, that is, assuming that Ben Berry is convicted of first degree murder, and there are other possibilities that will be explained to you as you go along. Briefly, it will be within your power to convict of first degree murder, second degree murder, or manslaughter.

I'm going to tell you now...of course, you will hear it in our opening arguments ...that no contention is going to be made that Ben Berry is innocent. The contention will be made though that he is not guilty. The contention will be made that he is not guilty of first degree murder. There are other possibilities. I'll explain them and view them many times throughout the course of this trial, but because it is within your power to convict him of first degree murder, it will also

be up to you to decide, assuming that conviction is obtained of first degree murder. It will be up to you to decide whether he is to be electrocuted to death or whether he is to spend his natural life in prison. That's a pretty weighted duty that's being loaded on you if you're selected on the jury. Now, I'm going to ask some questions and so that we can not take up too much time, I'll ask the questions generally. Then, I'll go down and ask each of you to respond to the question that I've asked.

Q If Ben Berry is found guilty of first degree murder, knowing that the law gives you an option of determining what the state will be, I want to know if any of you simply because he was convicted of first degree murder would automatically vote for the imposition of the death penalty...electrocution as opposed to spending his natural life in prison? You'll have to make that choice. So, given a question, Mr. Tadlock, do you have a...

A Yes, sir. It depends on the evidence.

Q It depends on the evidence. Miss Trigo?

A It would depend on the evidence.

Q It would depend on the evidence. Mr. Marotte?

A It would depend on the evidence.

Q Mr. Andry?

A Given proof, I would definitely vote on a death penalty.

Q Sir?

A I would vote the death penalty.

Q You would vote the death penalty?

A If the evidence proves it.

Q If the evidence proves it?

A Yes.

Q If the evidence proves that he was guilty of first degree murder, you would only be able to vote for the death penalty?

A Right.

Q And you cannot consider the alternative; which is to sentence him to prison for the rest of his natural life?

A (Inaudible response.)

Q Miss Raymond?

A Yes, I can.

Q Mr. Perry?

A I'm Mr. Donahue.

Q You're Mr. Donahue?

A Yes, sir.

Q Excuse me. What would be your position, Mr. Donahue?

A I can't vote on a death penalty.

Q Under any circumstances?

A No, sir.

Q Well, Mr. Donahue, let me ask you this: Can you conceive of a set of circumstances...

mass murder, for example...or some particularly brutal crime say perpetrated against someone in your own family...

MR. KONRAD:

Wait a minute. I think that's going much too far.

MR. LEITE:

Your Honor, I think it's going way beyond the scope when he goes into the man's personal family.

THE COURT:

All right. Rephrase your question.

Q Certainly you think of a set of circumstances involving a murder that would enable you to consider the imposition of the death penalty?

A No, sir.

Q Absolutely not?

A No.

Q Thank you.

You're Mr. Trudeaux?

A Yes.

Q Mr. Trudeaux, what is your response to the question I first asked?

A It depends on the evidence.

Q Miss Bishop?

A It would depend on the evidence but I want to know one question: Would this decision have to be unanimous or is it eight - four

A No, ma'am. First of all, to convict Ben Berry of first degree murder you're required the unanimous...

A That's what I mean.

Q ... vote. Then, there will be a sentencing phase after the trial phase and it will once again require that all twelve of you agree that he be electrocuted or that there could be a death penalty.

Q Miss Forges?

A It would depend on the evidence.

Q Miss Bordelon?

A It would depend on the evidence.

Q Miss Allen?

A It would depend on the evidence.

Q The next question, and I want to go down the line just as we've begun, I want to know if you understand if you are instructed by the Judge that a life sentence can be returned regardless of the evidence, do you think you can accept that as a principle of law to guide you in this case? I'll rephrase it. I've told you and I'm suggesting that the Judge will instruct you that regardless of the evidence it is within your power to vote for a sentence of life imprisonment. Do you understand that? Miss Trigo?

A Yes.

Q Mr. Merotte?

A Yes.

Q Miss Raymond?

A Yes.

Q Mr. Perry?

A Yes.

Q Mr. Donahue?

A Yeah...I didn't understand the question.

Q All right. Do you understand that regardless of the evidence it is within your power of a juror to vote for any or either of the two things that are permitted under the first degree murder statute? Do you understand that you can vote for life imprisonment as opposed for the death penalty?

A Yeah. I could do that.

Q Mr. Trudeaux?

A Yes.

Q Mrs. Bishop?

A Yes.

Q Miss Forges?

A Yes.

Q Miss Bordelon?

A Yes.

Q Miss Allen?

A Yes.

Q A few more brief questions. This is going to get very tiring for all of you but it's something that we have to do in order to assure that everybody, the State and the

defense, gets a fair trial as possible.

I think that I pointed out to you that a death sentence of vote to impose the penalty of death must be unanimous. All of you must agree. One of you can keep that from happening. So I don't have down the list of names I'll just have to start with Mr. Tadlock and ask you if you understand that that is the case. A nod will be sufficient.

A (Affirmative response.)

MR. BLANCHE:

You will be instructed during the course of this case and you'll be informed by me and possibly by Mr. Leitz that there're certain principles of law that must apply to the situation: principles that having taken your oath as jurors must be followed. The first that I would like to bring to your attention and ask you if you understand it is that there are various grades of guilt. Of course, in any given trial situation there is also a possibility that the defendant will be found innocent. There is in our law a presumption that the defendant, when he entered this courtroom and we began this trial is innocent. The mere fact that he has been indicted by a Grand Jury is not to sway you. You are to

be here at the beginning of this trial with no real opinion. It is not to be fixed. The presumption is until it's been rebutted by evidence that the defendant, that Ben Berry, is innocent of not only first degree murder or second degree murder but of the crime.

Q Do you understand and would you be able to afford the defendant the presumption of innocence that is incorporated into our law? Mr. Tadlock?

A Yes.

Q All right. Miss Trigo?

A (Affirmative response.)

Q Miss Marotte?

A (Affirmative response.)

Q Mr. Andry?

A (Affirmative response.)

Q Miss Raymond?

A (Affirmative response.)

Q Mr. Perry?

A Would you give me that question again?

Q I'm just saying what's basic in our law and that is that specifically because the defendant a man is here at thim counsel table and has been charged with a crime and indicted, will you give him at least at the beginning of this trial a presumption of innocence?

A Yes.

Q Mrs. Donahue?

A (Affirmative response.)

Q Mr. Trudeaux?

A (Affirmative response.)

Q Miss Bishop?

A (Affirmative response.)

Q Miss Forges?

A (Affirmative response.)

Q Miss Bordelon?

A (Affirmative response.)

Q Miss Allen?

A (Affirmative response.)

Q The second principle of law that I would like to ask you, if you can understand what's been brought to your attention, don't be offended when I say if you can understand because many of us who view with it day in and day out don't fully understand much of the law that we work with on a daily basis, so I don't mean to offend you by guessing that you might not understand it but I just have to ascertain it that you do and understand what is going to be critical to the conduct of this trial. In our law there is a requirement that the State not only prove its case beyond a reasonable doubt and to a moral certainty but that it prove each and every element of the case beyond a

reasonable doubt and to a moral certainty. For example, the crime of murder there are various types of murder. We'll require proving, for example, that someone was actually murdered. They have to prove that there was a death. That's one element of first and second degree murder.

Another element, and I think that it will be of great, great importance during the course of this trial, is that the State must prove beyond a reasonable doubt and to a moral certainty that the defendant have a specific intent to either kill or commit great bodily harm.

I want you to think about the words "specific intent" because that's critical to the State's case. I'd like to read to you of our statute of specific intent, and I'd like to remind you once more that this is perhaps the most critical process of this trial. In our criminal code, Paragraph 10, they define criminal intent. It says, "Criminal intent may be specific or it may be general." We're dealing critically in this case with specific intent.

This is what specific criminal intent is and this is what the state must prove beyond a reasonable doubt: "Specific criminal intent is that state of crime

which exists when the circumstances indicate that the offender actively desired in prescribed criminal consequences to follow his act or failure to act." Let me read it one more time and believe me, you'll hear it again: "Specific criminal intent is that state of crime which exists when the circumstances indicate that the offender actively desired to prescribed criminal consequences to follow this act or failure to act."

Now, I'd like to start and dispense with the names once again and ask you to nod in affirmation or negation if you generally understand what I've read to you about specific criminal intent.

Sir?

A (affirmative response from all jurors.)

Q If you have any questions about this, ask me now because this is as critical a portion of this trial as it can be.

By the way, the portion of this trial a voir dire examination. I don't know why they use foreign words but loosely translated from French it means to tell the truth. We're asking you to really kind of bare your souls and tell us a whole lot about you that we have no right to know except for the fact that we're all here

under a very serious trying circumstance.

One more thing I want to bring to your attention and I'll sit down for a little while. I'd like to ask each of you...

A JUROR:

Does specific intent cover knowing that he may have killed someone in order to commit the crime?

THE COURT:

Let me say this. We're getting a little bit away from voir dire. At this point here we're almost giving legal arguments in this case. I will, when the jury is selected and the case is argued and submitted, I will then instruct the jury as to the law. I will attempt to clear up any of these questions at that time... what specific intent is, where you find it, where you don't find it, is all contained in my instructions that I'll give to you.

MR. BLANCHE:

I am just really reading the law to you. I can't interpret it for you except when I get to argue to you at the end of this trial, but I'd like to ask each of you if you are selected as jurors in this case could you assure me that throughout this case and especially when you are

retired to go into the jury room and deliberate, could you promise me to be independent to maintain an open mind and could you promise me to go in there and discuss and debate each point that's been brought to your attention throughout this trial where the viewpoints are given, not only by the State of Louisiana, but from my viewpoint especially Ben Berry the fairest possible trial knowing the decision you may have to make at some later time; that is, at the end of this trial? Could you give me that guarantee?

A (Affirmative response from all jurors.)

THE COURT:

May I see the attorneys at the bench. Let's go off the record.

(Bench discussion.)

THE COURT:

Mr. Leitz.

MR. LEITZ:

Your Honor, the State will move to challenge Mr. Paul Marotte, Mr. Louis Donahue, Mr. Alcide Trudeaux and Doris Forges.

THE COURT:

Is that it, Mr. Leitz?

MR. KONRAD:

One of those was for cause, Your

Honor.

THE COURT:

I'll make sure the minutes are clear.

Mr. Blanche.

MR. BLANCHE:

Your Honor, would Mr. Leitz state the names of the individuals he's challenging one more time?

MR. LEITZ:

Paul Marotte, Louis Donahue, Alcide Trudeaux, Doris Forges.

MR. BLANCHE:

Your Honor, we challenge Mr. Tadlock, Miss Raymond... I think that's it.

THE COURT:

Is the panel acceptable to everyone?

Mr. Tadlock, Mr. Donahue, Mr. Trudeaux, Mr. Marotte, Miss Forges and Miss Raymond, would you go with Mr... would you go in the jury room, please. You're excused from this case. Thank you very much.

Would you swear in the panel of the jury?

(Helen Trigo, Jerral Andry, Harris Perry, Mildred Bishop, Elizabeth Bordelon and Elizabeth Allen were administered the oath to serve in this matter.)

THE COURT:

Mr. Clerk, call six more jurors.

THE CLERK:

Richard Tucker, Paul Plusquellec, Frances Sofia, Carolyn Larose, Dorothy Williams, Burtis Carter.

(Whereupon, the voir dire oath was administered.)

THE COURT:

Ladies and gentlemen, were you able to hear when I asked the questions to the preceding group of people seated in the jury box? I'll ask them again to you. Do you know anybody seated at the counsel table? Do you know anything at all about this case except what you may have heard here in the courtroom today? Do you have any preconceived...yes, sir?

A JUROR:

Yes, sir. I've heard of the case before and I'm pretty sure I know which one you're talking about.

THE COURT:

All right, sir. I'm sure it was in the paper. Do you have any preconceived ideas because of what you read in the papers?

A JUROR:

Yes, sir.

THE COURT:

Well, you have made up your mind already about the case?

A JUROR:

I know I was pretty upset about it. I have preconceived feelings about it. I might be swayed differently.

THE COURT:

Well, I'm not going to try to go into too much of your feelings at this time and I appreciate your candor because what we're looking for is honest answers. Do you feel that no matter what the evidence would be in this case that your mind is already made up as to what type of verdict you would render?

A JUROR:

Not necessarily.

THE COURT:

Well, let me say this: I don't want you to take this as argument on my part but as an explanation to you. The law says, and it's a time honored tradition and part of our legal heritage, that a defendant is presumed innocent until proven guilty. He is given the benefits of the doubt. He can only be convicted when the evidence is such that it would be beyond a reasonable doubt that the jury feels he's guilty. These are

safeguards for the life and liberties for our people.

With that could you not follow our law and apply that law to the facts that you would hear?

A JUROR:

Yes, sir.

THE COURT:

All right. Anybody else have...fine. Do you feel that you could sit here in this courtroom and listen to the evidence as it unfolds and apply that evidence to your mind along with the law that I will instruct you and come up with a fair verdict for either the State or the defendant, depending on how you feel after you've heard the evidence? Could you do that?

A (Affirmative response from all jurors.)

THE COURT:

Okay, I'll let the attorneys ask you some questions.

MR. KONRAD:

May it please the Court, ladies and gentlemen, including the prospective jurors in the box, I want to ask each of you a few of the questions that you've heard the other jurors asked which would give both defense counsel and Mr. Leitz

and I some general idea to your background which assists us in making decisions as to who would be the best jurors to sit in this case.

BY MR. KONRAD:

Q Mr. Tucker, how old are you, sir?

A Twenty-four.

Q Are you married?

A Yes.

Q Any children?

A No.

Q What is your occupation?

A Sports editor for the East Bank Guide.

Q How long have you been so employed?

A Two and a half years.

Q And you've lived in the Parish for how long?

A Sixteen years.

Q Mr. Plusquellec, how old are you?

A Thirty-seven.

Q Are you married?

A Yes, sir.

Q Any children?

A Three.

Q [illegible] old are they?

A Twelve, ten, eight.

Q Your occupation?

A I'm District Geologist for Texaco.

Q And you've been employed by Texaco for how long?

A Nine and a half years.

Q And you've lived in this Parish for how long?

A For the same amount of time.

Q Where are you from originally?

A West Virginia.

Q Thank you, sir.

Miss Sofie...

A I'm seventy years old.

Q Excuse me, seventy?

A Yes, sir.

Q Are you married?

A Yes and I have two daughters who one is married and one's not. I have three grandchildren and one great-grandchild.

Q Are you employed?

A No, I'm retired.

Q What did you do before you retired?

A I was a packer at Pennington Ford. I also worked at Elmer's Candy Company. They both went out of business.

Q How long have you lived in this Parish?

A Well, I've been thirty-three years in this Parish.

Q And where are you from originally?

A From New Orleans.

Q Miss Larose, how old are you, ma'am?

A Thirty-two.

Q Are you married?

A Yes.

Q Children?

A One.

Q And how old is that child?

A Ten.

Q Are you employed?

A Yes, I'm employed.

Q What is your occupation?

A At the Credit Department at Sears.

Q How long have you been so employed?

A Nine years.

Q How long have you lived in this Parish?

A All my life.

Q Miss Williams, how old are you, ma'am?

A I'm fifty-three.

Q Are you married?

A Yes, I am.

Q Children?

A Seven.

Q What are their ages?

A Well, they're twenty-nine through eighteen.

Q Are you employed outside of the home?

A At this time, no.

Q You have been in the past?

A Yes.

Q In what capacity?

A I'm a distributor for Van (spelled phonetically)
Beauty Concept.

Q It's an independent salesman type...

A (Inaudible response.)

Q Okay. How long have you lived in the Parish?

A Close to twenty-five years.

Q Are you originally from the New Orleans area?

A Right.

Q Mr. Carter, how old are you?

A Forty-three.

Q Excuse me?

A Forty-three.

Q Are you married?

A Yes, sir.

Q Children?

A Three.

Q And your occupation?

A I work for Maison Blanche.

Q Are you a salesman or ...

A I'm a drapery installer.

Q Drapery installer?

A Right.

Q And how long have you been so employed?

A Under three years.

Q And you've lived in this Parish for how long?

A Nine years.

Q Originally from this area or from out of town?

A From New Jersey.

Q From New Jersey?

A Right.

MR. KONRAD:

All of you, in general, have any of you ever had a member of your family that

has been personally charged with a serious crime?

A JUROR:

Yes, I've had one of my boys.

BY MR. KONRAD:

Q One of your children?

A Yes, sir.

Q Was that down here in this area?

A (Inaudible response.)

Q Was he convicted?

A Oh, no.

MR. KONRAD:

Have any of you ever been a victim of a crime, of a serious crime, or any member of your family?

A (Negative response from all jurors.)

Q Mr. Carter, as far as your experience that you have had with your son, do you think that would influence your ability to sit as a juror in this case today?

A No, sir.

MR. KONRAD:

Now you've heard explained to the previous panel the offense in which the defendant in this case is charged. He's charged with the crime called first degree murder in this State. First degree murder as passed by the legislature reads as follows: "First degree murder is the

killing of a human being when the offender has specific intent to kill or to inflict great bodily harm."

So, the simple definition that the legislature passed of first degree murder says that the elements of the crime would be: (1) the killing of a human being, that we have to prove that a human being was killed; (2) that the offender had the specific intent to kill or to at least cause great bodily harm to another person. Those are basically the two elements of first degree murder. What we have to prove is: (1) that there was a death; (2) that the offender actively intended that that death would result from his action, or that he at least intended to create or cause great bodily harm upon some person. Because of a recent case which was decided by our Supreme Court that Supreme Court then decided that in addition to finding those two elements and in order to find the defendant guilty of first degree murder that the jury then have to find one of the following facts in the circumstances existed. You first have to find the facts that I just set forth. Then, you have to find: (a) that the offender was engaged in the

perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; (b) or that the victim was a fireman or peace officer engaged in his lawful duties ...a police officer; (c) the offender knowingly created a risk of death or great bodily harm to more than one person.

It's one of those three circumstances and, in fact, the State will submit that all three of those circumstances are present in the incident in this case. In addition to the specific intent, the defendant in this case was in fact engaged into what was an attempted armed robbery, a bank robbery. Second of all, the victim was, in fact, a police officer engaged in his lawful duties. Third, there was, in fact, more than one person put in danger or risk of death or great bodily harm.

This is the charge of the crime that the state is expected to prove. If we prove each of those elements, we will ask you that you find the defendant guilty as charged of the crime of first degree murder.

BY MR. KONRAD:

Q Do each of you new jurors understand what the State expects to prove Mr. Berry guilty of

of?

A (Inaudible response.)

MR. KONRAD:

If the State proves the defendant guilty of each of those elements so that you then find the defendant guilty of first degree murder, you will then be asked to go out again and to deliberate on the question of what should be done with Mr. Berry. That, of course, is then a decision for you to make as to whether the defendant should be convicted or should be sentenced to death, that is, to capital punishment, or whether he should be sentenced to life imprisonment. That's a separate deliberation for you ladies and gentlemen to make if you, in fact, convict him of the first degree murder.

Under certain circumstances, or if each of you feel that the circumstances warrant it that you could, in fact, return the death penalty to Mr. Berry...I'm not asking you to prejudge this case, I'm asking you if there's something about the death penalty which would make it impossible for you to return that verdict if, in fact, the facts warrant it?

BY MR. KONRAD:

Q Mr. Tucker?

A No.

Q Mr. Plusquellec?

A No.

Q Miss Sofia?

A No.

Q Miss Larose?

A No.

Q Do you, each of you, in fact, Mr. Williams and Mr. Carter, that if the fact warrant you could return such a verdict?

A (Inaudible response.)

THE COURT:

Did you wish to say something, sir?

A JUROR:

Yes, sir. I have a problem and you asked this of the last group at the beginning about "are we able to be sequestered". I have a problem because my wife is going out of town tomorrow with her brother to take care of their father. I have three children at home which would make it very difficult for me to be sequestered.

THE COURT:

You have three children, three small children?

A JUROR:

Yes, sir.

THE COURT:

Are you supposed to take care of them?

A JUROR:

Yes, sir.

THE COURT:

Well, gentlemen, do you have any problems in my excusing Mr. Plusquellec?

MR. KONRAD:

We have no objection.

MR. BLANCHE:

No objection.

THE COURT:

Under the circumstances we couldn't expect you to sit in the case and forget about your children. You'll be free to leave. You're excused, sir.

MR. KONRAD:

That was going to be a question.

BY MR. KONRAD:

Q Are there any circumstances, a particular health circumstance, or problem at home, or any other reason that no one has explored with you that would make it difficult for you to sit here for the next perhaps two days and give both the State and the defendant a fair trial and impartial trial in this matter?

Yes, Miss Larose?

A I have asthma and I couldn't give a 100%

guarantee that it wouldn't...

Q As far as you know now...

A Right now, I'm okay.

Q Okay.

THE COURT:

Well, that's why we get an alternate juror.

Q Is there any reason that any of you might know or maybe that you heard of the Judge, or the Assistant D.A., or the defense counsel going through with the previous panel, is there any reason that perhaps no one has discussed that would not allow you to give both the State and the defendant a fair and impartial trial in this matter?

A (Inaudible response.)

Q Each of you would feel that you could, in fact, do that?

A (Inaudible response.)

MR. KONRAD:

We tender the jurors.

BY MR. BLANCHE:

Q Mr. Tucker, were you -- did you hear most of the questions that I asked the panel before they sat?

A Yes.

Q Do you have any questions about the principles of law that I attempted to explain to the jury panel?

A No.

Q Do you have any preconceived attitudes about offenses that result in the death of another person; specifically, do you have an attitude that the only reasonable punishment should be death?

A No.

Q Miss Sofia?

A No.

Q Miss Larose?

A No.

Q Miss Williams?

A No.

Q Mr. Carter?

A No.

Q I'd like to know if all of you that in order to find Ben Berry guilty of first degree murder it would require you unanimous...it would require unanimity among all of you. All twelve of you would have to vote for that as opposed to the lesser included offenses that will also be within your power to vote for them. They are second degree murder and manslaughter. Do you understand that it requires unanimity, Mr. Tucker?

A Yes.

Q Miss Sofia?

A Yes.

Q Miss Larose?

A Yes.

Q Miss Williams?

A Yes.

Q Mr. Carter?

A Yes.

Q Additionally, and I would like for you just to signify by a nod with your head, do you also understand that once that first stage of this trial is completed, there will be a second stage called the sentencing phase of the trial. Once again, whatever determination that will be reached unanimously, all of you would have to agree that the appropriate sentence is death as opposed to natural life imprisonment. Do you understand that?

A (Affirmative response from all jurors.)

Q I'd like to ask you if you went into the jury room to deliberate could you be independent, could you have the capacity to abide by your convictions regardless of bargaining? Would it be impossible to sway you once you have formed an opinion based on the evidence?

MR. LEITE:

Your Honor, I'm going to object to that. I don't think that that's proper.

THE COURT:

Ladies and gentlemen, I will instruct you prior to your retiring to deliberate on what the jury's duty is in the jury room how you should hold to your own convictions unless your fellow jurors can convince you that your original position was wrong. You should not change your position just because you're outvoted or outnumbered if that's the way you really feel about the case. Hold to your convictions unless your fellow jurors can convince you that you're wrong. That is what Mr. Blanche is trying to get to.

MR. BLANCHE:

Correct. Thank you, Your Honor. The Judge phrased it better than I could.

BY MR. BLANCHE:

Q Mr. Tucker, did you understand his explanation?

A Yes.

Q Miss Sofia?

A Yes, I did.

Q Miss Larose?

A Yes.

Q Miss Williams?

A Yes.

Q Mr. Carter?

A Yes.

MR. BLANCHE:

Thank you.

THE COURT:

Go off the record.

(Off record.)

THE COURT:

All right. Mr. Leitz.

MR. LEITZ:

Your Honor, at this time the State will peremptory challenge Frances Sofia and Burtis Carter.

MR. BLANCHE:

I have no challenges, Your Honor.

THE COURT:

All right. Mr. Carter and Miss Sofia, thank you for being here. Would you go with this gentleman so he can get your phone number and your address. Thank you for being here.

Would you administer the jurors' oath.

(Richard Tucker, Carolyn Larose and Paul Pitre - ex foreman Dorothy Williams were administered the oath to serve in this matter.)

THE COURT:

Let's take a five minute recess.

(Recess.)

(Whereupon, the jury returned to the courtroom, in the custody of the Deputy Sheriff.)

THE COURT:

All right.

MR. LEITZ:

Do you want to go ahead and call the alternate at the same time you call this panel?

MR. BLANCHE:

It's all right with me.

THE COURT:

All right. The last person called who is selected will be the alternate.

Gentlemen, do you want to poll the jury or do you waive polling the jury?

MR. LEITZ:

The State will waive polling the jury.

MR. BLANCHE:

Defense waives polling of the jury.

THE COURT:

All right. Call four jurors. The last person called and who is selected will be the alternate.

THE CLERK:

Philip Ferrand, Charles Todaro, Frank Sherman, Sidney Forest.

THE COURT:

Would you administer the voir dire oath, Mr. Clerk.

(Whereupon, the voir dire oath was administered by the Clerk.)

THE COURT:

Gentlemen, I'm going to ask you some questions which are beginning to sound repetitious but I have to ask them and ask that you answer them.

Do you know anybody seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case except what you may have heard in the courtroom?

A (Negative response from jurors.)

THE COURT:

Do you have any reason to give to the court why you cannot sit here and listen to the evidence and apply the law as I will give it to you to that evidence and give the State and the defendant a fair trial? Could you do that?

A (Affirmative response from all jurors.)

THE COURT:

Okay. I'll let you answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Mr. Ferrand, how old are you?

A Fifty-nine.

Q Are you married?

A Yes.

Q Any children?

A Three children and nine grandchildren.

Q What are the ages of your children?

A Thirty-one, thirty-three, and thirty-five.

Q Are you employed, sir?

A Yes, sir.

Q What do you do?

A Painter.

Q How long have you been a painter?

A Since 1942.

Q How long have you lived in Jefferson Parish?

A Oh, about twenty-eight years.

Q Have you or any member of your family ever been charged with a serious crime?

A Not my family. My in-laws.

C Would that have any effect on your decision here today?

A Oh, I don't know. You want me to tell you what he did?

Q That's okay. Would the fact that one of your in-laws was charged with something, would that have any bearing on your verdict here today?

A No, I don't think.

Q Mr. Todaro, how old are you?

A Twenty-two.

Q Are you married?

A Yes, sir.

Q Any children?

A Yes, two.

Q Are you employed, sir?

A Avondale Shipyard.

Q What do you do for Avondale?

A I'm a deckhand.

Q How long have you been employed by Avondale?

A Four years.

Q How long have you lived in the Parish?

A Twenty-two years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A Never.

Q Mr. Sherman, how old are you?

A Sixty-seven.

Q Are you married?

A Yes.

Q Any children?

A Four.

Q What are their ages?

A Twenty-seven to seventeen.

Q Are you employed, sir?

A I'm a retired accountant and administrator.

Q What were you employed by, sir.

A Lighthouse for the Blind.

Q How long were you with Lighthouse for the Blind?

A Twenty-eight years.

Q How long have you lived in Jefferson?

A Continuously for twenty-seven years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim of a serious crime?

A No.

Q Mr. Forest, what is your age, sir?

A Sixty-five.

Q Married or single?

A Married. I have three kids...thirty...thirty-five, thirty and twenty-seven. I worked at Falstaff Brewery and am retired.

Q How long were you with Falstaff?

A Thirty years.

Q How long have you lived in the Parish?

A About thirty years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

MR. LEITZ:

The people who have been called we're dealing here with a crime of first degree murder. The legislature has defined first degree murder as the killing of a human being when the offender has specific intent to kill or inflict great bodily harm. In order for you to come

back with the crime of first degree murder, there are certain circumstances with what the Supreme Court has required by your decision: (1) that the offender was engaged in the perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary or armed robbery; the victim was a fireman or peace officer engaged in his lawful duties; thirdly, the offender knowingly created a risk of death or great bodily harm to more than one person.

If the State presents to you a case which falls in the grounds of the law as I just read it to you, do you think that you could not in this particular case but in any case present it to you in the following circumstances that we just read to you, could you come back with a death penalty?

A JUROR:

I couldn't.

Q Under any circumstances, could you come back with the death penalty?

A I could send him for life.

Q What about you, Mr. Ferrand?

A I could sentence him to life. I don't think you have a right to take someone else's life.

Q Under no circumstances whatsoever?

A No.

Q Mr. Todaro?

A Yes, sir.

Q You could come back with the death penalty?

A (Affirmative response.)

Q Mr. Forest?

A Do you mean Mr. Sherman?

Q I mean Mr. Sherman.

A Yes, I could.

Q You could come back with the death penalty.

A Correct.

MR. LEITZ:

Do you know of any reason why any of y'all could not give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. LEITZ:

Is there any reasons for health or anything else why you could not serve on this jury and give both the State and the defendant your full attention for the entire time of this trial?

A (Negative response from jurors.)

MR. LEITZ:

I tender the panel.

MR. BLANCHE:

Gentlemen, the State of Louisiana through its legislature has determined that at lease in some circumstances certain

types of criminal behavior; like one, the death penalty. In that very same statute dealing with first degree murder they don't say that the death penalty as opposed to the penalty of natural life imprisonment is to be preferred one above the other. It's a decision that the legislature has determined to be made by you, taking into consideration not only the evidence but perhaps the entirety of your human experience.

You and Mr. Forest have both indicated that you just couldn't return or vote for it. Our law has developed so that if you make that statement and you're absolutely unequivocable and if you say with certainty that you couldn't even consider it...

MR. KONRAD:

Your Honor, I'm going to object to what I think Mr. Berry...I mean, Mr. Blanche, is leading into. He's telling them what the effect of making that statement is. I certainly think it's objectionable to tell the jury what that is.

THE COURT:

I'm not sure or unless you want to come up here and tell me something out of the presence of the jury but so far I

haven't grasped your meaning.

MR. KONRAD:

Could we approach the bench?

THE COURT:

Uh-huh.

(Bench discussion.)

BY MR. BLANCHE:

Q Mr. Ferrand, you don't know what evidence is going to be presented to you here in this case, do you?

A No.

Q I know I may sound like the prosecutor here but I want to ask you is there any circumstance do you think on a set of circumstances that resulted in another person's death that has caused some variety of homicide under our law where you could consider the imposition of the death penalty? You already said you could certainly sentence a man to prison for life but there are two possibilities in this statute. I'm asking you is there any possibility that you could consider the imposition of the death penalty?

A If I understood what you said correctly as a decision that the legislature can choose either one?

Q Sir, you as a juror...

A ...in other words, if I agree to the penalty,

I don't have to say he has to die. The legislation will have it on their chests to give that, is that right?

Q The legislature has said that if you find Ben Berry guilty, then you will have two things to consider at the sentencing phase; (1) Do you want to put him in prison for the rest of his life; (2) Do I want him to die?

All I need for you to say is if you would consider the imposition of that death penalty? I know you would consider the other half of that possibility.

A If what I say is considered means I would cause him to die?

Q It means that if you consider and decide that it was appropriate in this case, yes.

A All right. You said the legislature would take over and they would...

THE COURT:

Mr. Ferrand, let me clear up your mind.

The legislature has already passed this law. We're putting into application in this trial that part that we're talking about. When the case is submitted to you at the end of the trial, the jury will have two things to decide. The first thing is whether or not the defendant is

guilty of first degree murder. If they conclude he is, then they recess and go back and study again what to do with him. The choice is one of two things; either electrocution or life imprisonment. The jury, you have to make that decision, not the legislature. The legislature has already made its decision when it passed the law and passed it on down to us to administer. What the lawyer wants to know, what Mr. Blanche wants to know, is there any way, under any circumstances, you could consider the imposition of the death penalty...putting him to death?

A I don't want to take anybody's life. I don't want to be responsible for nobody's life.

MR. BLANCHE:

All right, thank you, sir.

THE COURT:

Mr. Ferrand, don't misunderstand, sir. We're trying to make you all...you're laymen, you're not lawyers...

A Would I be given the right to give the death penalty?

THE COURT:

You'd have to make that decision if you sat on this case.

A I don't want to take nobody's life.

THE COURT:

All right. We understand that and I want to make it clear that we don't expect you all to act like lawyers. You are laymen and these are complex terms. We are trying our best to explain to you in this short time...

A This isn't too much detail as it is.

THE COURT:

All right. We understand.

MR. BLANCHE:

We appreciate your candor.

BY MR. BLANCHE:

Q Mr. Forest?

A I feel the same way.

Q The same way.

A I couldn't take nobody's life.

Q But you could put them in prison...

A I could put them in prison. I couldn't take their life.

Q You couldn't even consider?

A I wouldn't. I'm telling the truth.

Q Yes, sir. I appreciate that.

Mr. Todaro, you indicated to Mr. Leitz that you certainly could consider the death penalty. Do you have any preconceived notions now and assume that conviction of first degree murder and I will plead that that is not necessarily the case because there are three possible

verdicts: first degree, second degree and manslaughter. Since you could consider the death penalty, do you think if the State proved first degree murder you would give it great consideration and it would be something you would be more likely to vote for rather than a sentence of natural life imprisonment?

MR. KONRAD:

Your Honor, I think that's an unfair question. How can you ask a juror what he would consider more than the other? The juror is called upon to make that decision when all of the facts are submitted.

THE COURT:

Well, let me instruct the juror first before and then I'll let him answer the question.

You'll be instructed to what you'll have to do when the case is submitted to you as a juror. By this time you are all getting a little bit more familiar with what the law and what we have in front of us here. The decision that is going to be up to the jury is: First of all, to come up with a verdict of one of the four possible verdicts you could come up with, either first degree murder, second degree murder, manslaughter, or not guilty.

Then if the jury should unanimously agree that he should be convicted to first degree murder, then you have another hearing, another decision to make, and that is whether or not to apply the death penalty or to give him life imprisonment.

Now, what he wants to know is if you do agree to first degree murder and that would be your verdict, would you then automatically feel that he had to go to the electric chair or would you give it consideration for the life sentence.

BY MR. BLANCHE:

Q So you don't have any...

A I would give it consideration.

Q ...set idea as to...

A No, I'm not to anyone's favor if that's what you mean.

Q Yes, sir.

Mr. Sherman, did you generally follow the gentleman I asked before?

A I believe that I have not made a decision that the death penalty could be automatic.

Q So then you would be free to consider either the two possibilities in the event of first degree murder?

A Yes.

Q Thank you, sir.

THE COURT:

All right. Mr. Leitz and Mr. Konrad.

MR. LEITZ:

Your Honor, we move to challenge Mr. Ferrand, Mr. Forest and the panel is acceptable.

MR. BLANCHE:

Could we approach the bench, please?

THE COURT:

Okay.

(Bench discussion.)

MR. BLANCHE:

Your Honor, we challenge Mr. Todaro and accept Mr. Sherman.

THE COURT:

Would Mr. Forest, Mr. Todaro, Mr. Ferrand, would you go and give your address, and Mr. Clerk, would you swear in Mr. Sherman.

(Frank Sherman was administered the oath to serve in this matter.)

THE COURT:

Let's call three jurors.

THE CLERK:

Luverne James, Helen McMillan, Elizabeth Buchanan.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

The last three ladies who were called, I'm going to ask you the same

questions I've asked the other jurors.

Do you know anybody involved in this case at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know at all about this case except what you heard here today?

A JUROR:

I remember reading about it.

THE COURT:

Did your reading about it in the paper influence you that you feel you could not give both the State or the defendant a fair trial?

A JUROR:

No, sir.

THE COURT:

Do you feel that you could sit here and listen to the evidence and apply the law as I will instruct you to that evidence and decide the case based upon the law and the evidence fairly and impartially without regard to either side? Could you do that?

A (Affirmative response from jurors.)

THE COURT:

Answer the attorneys' questions.

BY MR. KONRAD:

Q Miss James, how old are you, ma'am?

A Forty-four.

Q Are you married?

A Yes, sir.

Q Any children?

A Three.

Q What are their ages?

A Twenty-two through fourteen.

Q Are you employed outside of the home, ma'am?

A Yes, sir.

Q What is your occupation?

A Secretary for the Parish.

Q Parish?

A Yes, sir.

Q What department of the Parish?

A Recreation.

Q How long have you worked for the Parish?

A A little over three and a half years.

Q How long have you lived in the Parish?

A Fifteen years.

Q Are you from the New Orleans area?

A I'm originally from Iowa.

Q Thank you.

Miss McMillan, how old are you?

A Forty-eight.

Q Are you married?

A Yes, sir.

Q Any children?

A Yes.

Q How many?

A Six.

Q What are their ages?

A Twenty-nine, twenty-seven, twenty-six, twenty-two, eighteen and nine.

Q Are you employed outside of the home?

A Yes. I'm secretary for my husband's construction company.

Q How long have you lived in the Parish?

A Twenty-one years.

Q Miss Buchanan, how old are you?

A Forty-two.

Q Married?

A Yes.

Q Any children?

A Two.

Q Their ages?

A Eighteen and sixteen.

Q Are you employed?

A Yes.

Q Where?

A Real estate.

Q As an agent?

A Yes.

Q With whom?

A Grady Harper.

Q How long have you worked?

A Four...five years.

Q How long have you lived in this Parish?

A Fourteen years.

Q To all three ladies generally: Has anyone in

your family or you ever been charged with a serious crime or ever been a victim of a serious crime?

A (Negative response from jurors.)

MR. KONRAD:

I presume that all three of you have heard the definition of the description of the crime which the defendant in this case is charged; that is, he's charged with the crime of first degree murder under that statute. First degree murder is the killing of a human being where the offender has specific intent to kill or to cause great bodily harm upon the victim. Those are basically the two elements of the crime which the State intends to prove against this defendant.

In addition to that, it is now our burden to prove certain aggravating circumstances, a set of circumstances in addition to that if you will find the defendant guilty of first degree murder as opposed to second degree murder. Those circumstances are that the offender at the time of the killing was engaged in the prepetration or the attempted prepetration of serving crime, including the crime of armed robbery. If you will find a specific intent to kill and together

with the death of the victim and you find that at the time the defendant was, in fact, engaged in the attempted prepetration of an armed robbery, those would then be the facts necessary to convict of first degree murder.

Now you can go to the second category of first degree murder, which is if you will find the victim, the person who was killed, was a fireman or peace officer engaged in his lawful duties at the time of his death.

You could find the third circumstance that the offender knowingly created a risk of death or great bodily harm to more than one person.

If you find the first two elements, that is, specific intent to kill and death, you can then find any one of the three other elements; either that that death was during the commission of an armed robbery, or attempted armed robbery, or that the victim was a law enforcement officer, or that more than one person was put in danger at the time that the death occurred.

Q Do all three of you understand the nature of the charges that the State intends to prove?

A (Affirmative response from jurors.)

MR. KONRAD:

In addition, as you've heard discussed quite a bit this afternoon, the State then calls upon you, or if you would find the defendant guilty of first degree murder, that it is up to the jury to decide the penalty. The penalty could either be: One, life imprisonment, or capital punishment...that is, the death penalty. The jurors would be expected to retire and deliberate on this second question given the event that the defendant was convicted of first degree murder.

BY MR. KONRAD:

Q Do each of you feel that you could, in fact, return the death penalty under appropriate circumstances, or are you so opposed to that as a penalty available under our law that you don't think you could ever return?

Miss James, do you think you could if the state does prove the appropriate facts you could return the death penalty?

A Yes.

Q Miss McMillan?

A (Negative response from juror.)

Q You're shaking your head so you don't think that regardless of what the State may think the defendant is guilty of that you simply have some moral conviction against

the imposition of the death penalty?

A Not the death penalty.

Q You couldn't return the death penalty under any circumstances that we prove?

A Not even if it was one of my own family.

Q Miss Buchanan, how do you feel about it?

A Yes, I could.

Q You think that you could return that verdict?

A Yes.

Q Is there any reason that would prevent any of the three of you from sitting here and giving the State and the defendant a fair and impartial trial?

Miss James?

A I would, sir.

Q Excuse me?

A I would. I've just recently been separated and I'm legally responsible for my fourteen year old.

Q You mean that you may be kept here for the next two days and that would be a hardship on you?

A It would due to the fact that at the present time I don't have anyone I could leave him with day or night.

MR. KONRAD:

Your Honor, we have no problems excusing her.

THE COURT:

All right. Finish your voir dire.

BY MR. KONRAD:

Q Miss Buchanan, is there any reason whatsoever that would prevent your giving the State and the defendant a fair trial?

A (Inaudible response.)

MR. KONRAD:

Thank you very much.

We tender the jurors, Your Honor.

BY MR. BLANCHE:

Q Miss Buchanan, if Ben Berry was found guilty of first degree murder, do you think that without going into the evidence you would tend to vote automatically for the imposition of the penalty of death?

A (Inaudible response.)

Q Have you understood as the result of the questions that were asked here today that a life sentence can be returned because of the evidence, no matter how slight or how great or how aggravating?

A (Affirmative response from juror.)

Q Do you understand that the death penalty in Louisiana is a real thing that if Ben Berry is convicted and sentenced to death that he will be electrocuted?

A Yes.

(Off record discussion.)

MR. LEITZ:

Your Honor, at this time we move to excuse Miss McMillan and I think by joint consent we'll excuse Miss James.

MR. BLANCHE:

That's correct.

MR. LEITZ:

The remaining is acceptable, Your Honor.

MR. BLANCHE:

We accept Mrs. Buchanan.

(Elizabeth Buchanan was administered the oath to serve in this matter.)

THE COURT:

Call two more jurors.

THE CLERK:

G. T. Rinaldi, Doris Muhl.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Mr. Rinaldi and Miss Muhl, do you know anybody seated here at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case other than what you've heard here today?

A (Negative response from jurors.)

THE COURT:

Could you sit here and give both sides a fair trial after hearing the evidence from the witness stand and the law as I will instruct you?

A (Affirmative response from jurors.)

THE COURT:

Okay, answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Mr. Rinaldi, how old are you?

A Twenty-nine, married, and two children...five and two and a half.

Q Are you employed?

A Yes.

Q Where?

A Mechanical Construction Company.

Q What do you do there?

A I'm manager of the Service Department.

Q How long have you been with Mechanical?

A About a year.

Q What did you do prior to that?

A I was project manager for another construction company.

Q How long have you lived in the Parish?

A About eight years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim?

A No.

Q Miss Muhl, how old are you?
A Fifty-three.
Q Married?
A Yes. I have two children.
Q What are their ages?
A Thirty-four and thirty-two.
Q Are you employed outside of the home?
A Yes. I'm employed by the Jefferson Parish Public Utilities.
Q How long have you been so employed?
A Sixteen years.
Q How long have you been with the Parish?
A Thirty-nine years.
Q Have you or any member of your family ever been charged with a serious crime?
A No, sir.
Q Ever been a victim?
A No, sir.

MR. LEITZ:

Both of you heard previously when we defined what murder is in the aggravating circumstances necessary to come back with first degree murder.

BY MR. LEITZ:

Q Given a set of circumstances if we prove to you that there was a first degree murder and prove the aggravating circumstances, could you then come back with a death penalty?

A (Inaudible response.)

Q Do you know any reason why you can't give both the State and the defendant a fair trial?

A (Negative response from jurors.)

Q Do you know any reason why you can't stay here during the entire proceedings and give your full attention to what goes on in that witness stand and the law as it comes from the Judge?

A JUROR:

I will enter the hospital Sunday for tests.

Q As long as the trial ends before Sunday...

A Yes.

MR. LEITZ:

I have no further questions. I tender the panel.

BY MR. BLANCHE:

Q Mr. Rinaldi, do you understand that your respective of the evidence you were completely free once you go into that jury room to vote any way you want? Do you understand that?

MR. KONRAD:

Your Honor, I think you have to follow the law and the instructions of the Court. That's what your role is...to tell the jurors that he can vote any way he wants.

MR. BLANCHE:

I'll qualify that.

BY MR. BLANCHE:

Q Given the limitations imposed upon you by the Court, I will ask for specifically to the issue of guilt or innocence and, secondarily, to the issue of punishment being either the death penalty or life imprisonment. Do you understand that?

A Yes.

Q Miss Muhl?

A Yes.

Q Do you feel that you're commited to insure not the State but Ben Berry as fair a trial as possible?

A Yes, sir.

Q Miss Muhl?

A Yes.

Q Mr. Rinaldi, do you understand that the death penalty is now a reality in the State of Louisiana?

A Yes, sir.

Q Miss Muhl?

A Yes.

MR. BLANCHE:

Thank you.

MR. LEITZ:

Your Honor, we peremptorily challenge Miss Muhl. The panel is acceptable.

MR. BLANCHE:

We challenge Mr. Rinaldi.

THE COURT:

Mr. Rinaldi and Miss Muhl, would you go with this gentleman. Thank you very much. Call two more jurors.

THE CLERK:

Orelia Lyons, William Rhea.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

I'm going to ask you the same old questions. Do you know anybody seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case except what you heard here today?

A (Negative response from jurors.)

THE COURT:

Is there any reason why you could not sit here and give both the State and the defendant a fair trial based on the evidence and the law that will be given to you?

A (Negative response from jurors.)

THE COURT:

Answer Mr. Leitz's questions.

BY MR. KONRAD:

Q Miss Lyons, how old are you, ma'am?

A Forty-one.

Q Are you married?

A Yes.

Q Children?

A Three.

Q What are their ages?

A Twenty-four, twenty-five, and twenty-three.

Q Do you work?

A Yes.

Q What type of work?

A Cafeteria manager for Orleans Parish School Board.

Q How long have you been employed?

A Twelve years.

Q How long have you lived in this Parish?

A Thirteen years.

Q Are you originally from New Orleans?

A Yes.

Q Mr. Rhea, how old are you, sir?

A Fifty-seven.

Q Are you married?

A Yes. Two children. They're twenty-three and twenty-four.

Q And your occupation?

A Real estate appraisal.

Q Do you work for yourself?

A For Prudential Insurance Company.

Q How long have you been employed with Prudential?

A Thirty-one years.

Q And you've lived in this Parish for how long?

A Twenty-four.

Q Where are you from originally?

A Tennessee.

MR. KONRAD:

Has anyone of, anyone of your families ever been charged with a crime or ever been a victim of a serious crime?

A JUROR:

I had a brother.

Q Yes, Miss Lyons.

A I had a brother.

Q Was he a victim of a crime or charged with a crime?

A He was charged.

Q Do you feel that that would hinder your ability to serve as a fair and impartial juror in this case?

A No.

Q Would that in any way impair your ability to give the State and the defendant a fair trial?

A No.

MR. KONRAD:

Have both of you heard the many times that we've been over first degree murder and what its elements are and what you're called upon to decide as a juror in this case?

A (Affirmative response from jurors.)

MR. KONRAD:

Do you both understand the charge with what the defendant is charged?

A (Affirmative response from jurors.)

BY MR. KONRAD:

Q Miss Lyons, do you feel that you could return the death penalty if the State would prove all of the facts which it alleges in this case or under appropriate circumstances that you could return the death penalty?

A No.

Q Regardless of what the State may prove in this case you would not consider that as one of the verdicts that you might return in this case?

A No.

Q Mr. Rhea, how do you feel about the same question? Would you feel that at least the death penalty was an option available to you as a juror?

A Oh, yes.

Q That if the State would prove the appropriate facts that you could consider returning the death penalty?

A Yes, sir.

Q Do either one of you know of any reasons which would prevent you giving both the State and the defendant a fair trial?

A (Inaudible response.)

MR. KONRAD:

I tender the jurors.

BY MR. BLANCHE:

Q Miss Lyons, are there any circumstances wherein you could consider the imposition of the death penalty? I'm not referring to this case but could you conceive of a set of circumstances where it would be appropriate to do so?

A No. I just couldn't go with the death penalty for anyone.

Q Mr. Rhea, do you have a particular attitude about first degree murder? Do you think you understand pretty much what first degree murder is?

A Yes.

Q Do you have an attitude that would possibly compel you to vote for the death penalty that is required in first degree murder if proved?

A No, I don't think so.

Q You would have an open mind?

A Yes, sir.

Q You could consider that there might be in this case, assuming first degree murder... assuming that you go through the penalty phase...that life imprisonment would be appropriate as opposed to electrocution?

A Yes.

Q Do you promise me that you'll have an open mind on this case?

A Surely.

Q Are there any problems that would prevent you from serving on this jury?

A Not that I know of at all.

MR. BLANCHE:

Thank you.

(Bench discussion.)

MR. LEITZ:

The State will move to excuse Orelia Lyons. The panel was acceptable.

MR. BLANCHE:

The defense challenges Mr. Rhea.

THE COURT:

Folks, you can leave now. Thank you for coming. May I see the show of hands of how many jurors I have in the court-room? If there are any prospective jurors I want to see your hands so I can see how many I have left. One, two, three, four, five, six, seven, eight.

Let's call two jurors.

THE CLERK:

Georgia Willis, Viola Burks.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Ladies, you've heard these questions before and I'm going to ask them again.

Do you know anybody at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case?

A (Negative response from jurors.)

THE COURT:

Do you have any preconceived ideas about this case?

A (Negative response from jurors.)

THE COURT:

Could you sit here and give both sides a fair trial?

A (Affirmative response from jurors.)

THE COURT:

Okay. Answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Georgia, what is your age?

A Thirty-five.

Q Are you married?

A Yes.

Q Any children?

A Yes.

Q How many?

A Two.

Q What are their ages?

A Thirteen and eight. Thirteen and eight.

Q Are you employed outside of the home?
A Yes.
Q Where do you work?
A Belle Chasse State School for Retarded kids.
Q How long have you been there?
A Six years.
Q How long have you lived in the Parish?
A Thirty years.
Q Have you or any member of your family ever been charged with a serious crime?
A No.
Q Ever been a victim?
A No.
Q Viola, what is your age?
A Forty-one.
Q Are you married?
A Yes, I am.
Q Any children?
A No children.
Q Where are you employed, ma'am?
A Jefferson Parish School Board cafeteria manager.
Q How long have you been so employed?
A Eleven years.
Q How long have you lived in the Parish?
A Eleven years.
Q Have you or any member of your family ever been charged with a serious crime?
A No.
Q Have you ever been a victim?
A No.

Q Did you hear the definition of first degree murder and the aggravating circumstances?

A Yes.

Q Did you understand what they mean?

A Yes.

MR. LEITZ:

If the State were to prove that the defendant committed this murder and that there were aggravating circumstances, could you then consider the death penalty?

A JUROR:

Due to my religious beliefs, I could not consider the death penalty.

Q Under no circumstances?

A No.

Q You could consider the death penalty?

A Yes.

MR. LEITZ:

Do you have any reason that you know of why you could not sit on this jury and give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. LEITZ:

I tender the jurors.

BY MR. BLANCHE:

Q Miss Burks, is there any way I could change your mind?

A No.

Q Miss Burks, you can't think of any situation?

A No.

Q Miss Willis, do you feel that you have any predispositions as to what would be appropriate in the event that the State proved that as a result of my client's act that someone died if the State proved to your satisfaction...proved all the elements of the crime without a reasonable doubt and it was first degree murder, which means that someone died as a result of this act, do you feel that you would lean automatically in favor of the death penalty or would you be able to give equial consideration to the two possibilites that are open to you in this case?

A I would be able to give equal considerations.

Q Would you promise me that you could have an open mind?

A Yes.

MR. BLANCHE:

Thank you.

(Bench discussion.)

MR. LEITZ:

Your Honor, the State would move to challenge both of them.

THE COURT:

Miss Burks and Miss Willis?

MR. LEITZ:

Yes, Your Honor.

THE COURT:

All right. Miss Willis and Miss Burks, thank you for coming.

MR. BLANCHE:

Your Honor, at this time I would like to make an objection...perhaps I should approach the bench.

THE COURT:

All right.

(Bench discussion.)

THE COURT:

For the record, Mr. Blanche, after our bench conference, we've agreed that your objection will be argued out of the presence of the jury but you're not waiving it by not being committed to argue it at this point.

MR. BLANCHE:

Yes, sir.

THE COURT:

All right. Two more jurors.

THE CLERK:

Frank Schiro, Daniel Dufrene.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Gentlemen, do you know anyone seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this trial except what you heard here today?

A (Negative response from jurors.)

THE COURT:

Do you have any reason why you cannot hear the evidence and the law as I will give it to you and give both sides a fair trial?

A JUROR:

Yes, sir.

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. KONRAD:

Q Mr. Schiro, how old are you, sir?

A Forty-one.

Q Are you married?

A Married.

Q Children?

A Twenty-one, nineteen and nine months.

Q What is your occupation?

A I'm a mechanic.

Q With whom?

A (Indecipherable word) Construction.

Q Is that a general construction?

A Yes.

Q How long have you been employed?
A About five years.
Q Have you always done that type of work?
A Yes.
Q How long have you lived in the Parish?
A Eight years.
Q Where are you from originally?
A New Orleans.
Q Mr. Dufrene, how old are you?
A Thirty.
Q Married?
A Yes.
Q Children?
A (Inaudible response.)
Q And your occupation?
A (Inaudible response.)
Q Welding fabrications?
A Yes.
Q How long have you been employed by them?
A Six months.
Q Where were you employed before that?
A Delta Welding.
Q What did you do for them?
A I was an inspector.
Q How long have you lived in the Parish?
A (Inaudible response.)

MR. KONRAD:

Both of you have heard the definition of the crime of first degree murder that

was read to the previous panel?

A (Affirmative response from jurors.)

MR. KONRAD:

And both of you think you understand it?

A (Affirmative response from jurors.)

MR. KONRAD:

You both understand that one of the penalties that the jurors will be called upon to decide upon will be capital punishment or life imprisonment.. If you can find him guilty of first degree murder.

BY MR. KONRAD:

Q Mr. Schiro, could you feel that you could return the death penalty under the appropriate circumstances?

A No, sir.

Q Sir?

A No, sir.

Q Do you feel that under no circumstances and regardless of the facts that the State may prove in this case that you cannot return that penalty?

A No, sir.

Q You would not even consider that as one of the possible penalties?

A No.

Q Mr. Dufrene, how do you feel about the death penalty? I mean, do you think you could return it under the appropriate circumstance

A Under the appropriate circumstances.

MR. KONRAD:

Do either one of you know of any reason that will prevent either one of you from giving both the State and the defendant a fair and impartial trial?

A (Negative response from jurors.)

MR. KONRAD:

You know of no reason that would tender you or would make it difficult for you to give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. KONRAD:

I tender the prospective jurors.

MR. BLANCHE:

I'm beginning to sound like a broken record. Is there any set circumstances that you could conceive of where you would consider the death penalty as appropriate?

A JUROR:

No, sir.

BY MR. BLANCHE:

Q Mr. Dufrene, you heard the definition of first degree murder?

A Yes.

Q Do you understand that if there's a conviction of first degree murder there are two possible penalties; they are life imprisonment

and the death penalty?

A Yes.

Q Do you also understand that the law is not favored one of those penalties over the other? They're both just there and it's up to you...it's up to all of these people...to decide which will be appropriate. One of the elements that will have to be proven of first or second degree murder is did Ben Berry have specific criminal intent to do what he did. I'd like to read it to you and ask you if you generally understand it. "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired and prescribed criminal consequence for this act or failure to act." Do you think you'd be able to apply this law as will be read to you by the Judge in connection with your deliberation?

A Yes.

THE COURT:

All right, gentlemen.

(Bench discussion.)

MR. LEITE:

The state will move to challenge Mr. Schiro. The panel is acceptable.

MR. BLANCHE:

We accept Mr. Dufrene.

THE COURT:

Mr. Schiro, thank you for coming.

Swear in Mr. Dufrene.

(Daniel Dufrene was administered the oath to serve in this matter.)

THE COURT:

Call one more juror.

THE CLERK.

Elmer Kinabrew.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Gentlemen, if this juror is selected, will that be the alternate juror? Is that right?

MR. LEITZ:

That's right.

THE COURT:

Mr. Kinabrew, do you know anybody at the counsel table?

A (Negative response from juror.)

THE COURT:

Do you know anything at all about this case other than what you've heard here today?

A (Negative response from juror.)

THE COURT:

Do you have any reason why you cannot

give both sides a fair trial?

A (Negative response from juror.)

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. LEITZ:

Q Elmer, how old are you?

A Sixty-one.

Q Are you married, sir?

A Yes.

Q Any children?

A No.

Q Are you employed, sir?

A No.

Q Retired?

A Yes.

Q What did you retire from?

A I was working for myself.

Q What kind of business?

A I was in the dairy farm business.

Q How many years have you lived in Jefferson parish?

A Thirty-six years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim?

A No.

Q Mr. Kinabrew, did you hear us when we explained the definition of first degree murder was

and what the aggravating circumstances we need to prove?

A (Affirmative response from juror.)

Q If the State has proved all of the elements of the crime that is explained to you, would you then be able to come back with a death penalty?

A I'm afraid not.

Q Under any circumstances whatsoever?

A NO.

MR. LEITZ:

I tender the prospective juror.

MR. BLANCHE:

I have no questions. Thank you.

THE COURT:

You're excused, Mr. Kinabrew. Thank you for coming.

Call one more juror.

THE CLERK:

John Link.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Mr. Link, do you know anybody at the counsel table?

A (Negative response from juror.)

THE COURT:

Do you know anything at all about this case?

A (Negative response from juror.)

THE COURT:

I mean other than what you've heard here in the courtroom?

A (Negative response from juror.)

THE COURT:

Do you have any reason why you cannot give both sides a fair trial after listening to the evidence and the law in this case?

A (Negative response from juror.)

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. KONRAD:

Q How old are you?

A Twenty-four.

Q Married?

A Yes, sir.

Q Children?

A None.

Q How old is that child?

A I don't have any children.

Q I thought you said one. I'm sorry.

Where are you employed?

A Corco Incorporated.

Q What kind of business is that?

A Welding contractors.

Q What do you do? Are you a welder?

A Yes, sir.

Q How long have you been employed there?

A Ten months.

Q Who did you work for before that?

A Brown & Root.

Q Same type of work?

A Yes, sir.

Q How long have you lived in the Parish?

A All my life.

Q You heard all of the questions of the previous jurors concerning the nature of the crime in which the defendant is charged?

A Yes, sir.

Q You've also heard the fact that you could return the death penalty?

A Yes.

Q Could you return the death penalty if the facts proven by the State would warrant the death penalty?

A Yes, sir.

Q Do you know any reason whatsoever that may make it difficult for you to serve as the alternate juror?

A No, sir.

Q You understand that the alternate juror that you are to hear all of the facts and you will only deliberate with the rest of the jurors if something happens to one of them?

A Yes, sir.

MR. KONRAD:

I have no other questions.

BY MR. BLANCHE:

Q Mr. Link, in the event that one of the twelve jurors we've selected so far becomes ill or for some reason can't continue through the trial based on the principles that you've heard, could you give my client a fair trial?

A Yes, I could.

Q Could you (indecipherable word) the presumption of innocence?

A Depending on what the facts were.

Q Right. Will you require the State of Louisiana to prove to you every element of the offense charged beyond a reasonable doubt?

A Yes, sir.

MR. BLANCHE:

Thank you.

MR. LEITZ:

Mr. Link is acceptable to the State, Your Honor.

MR. BLANCHE:

He's acceptable.

THE COURT:

Swear in Mr. Link, please.

(John Link was administered the oath to serve in this matter.)

THE COURT:

Mr. Clerk, read the bill of indictment and the defendant's plea on arraignment.

THE CLERK:

September 15, 1978

Indictment filed, Deputy Clerk Carroll A. Marse.

No. 78-2151

The State of Louisiana vs. Benjamin A. Berry.

Indictment for first degree murder or R.S. 14:30, a true bill September 15, 1978. Charles Garrets, Foreman of the Grand Jury.

"The State of Louisiana, Parish of Jefferson, 24th Judicial District Court, Grand Jurors of the State of Louisiana, duly impaneled and sworn, in and for the body of the Parish of Jefferson in the name and by the authority of the said State, upon their oath, present: That one Benjamin A. Berry, late of the Parish of Jefferson on or about the 30th day of January in the year of our Lord, one thousand nine hundred and seventy-eight with force of arms, in the Parish of Jefferson aforesaid, and within the jurisdiction of the 24th Judicial District Court of Louisiana, in and for the Parish of

Jefferson aforesaid, then and there being committed first degree murder of Robert Cochran, contrary to the form of the statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State. Signed, Patrick C. Leitz, Assistant District Attorney."

On September 22nd, 1978, defendants appeared in open Court represented by counsel and entered a plea of not guilty to the State charge.

THE COURT:

We're going to sequester the jury until 9:30 tomorrow morning. We'll arrange for transportation to take you to a nice restaurant and to a hotel. The four people who were selected just now, you might want to use the telephone to call your family.

Mr. Hartley, would you sequester the jury?

(Whereupon, the jury was sequestered in the custody of the Deputy Sheriff.)

THE COURT:

The fugitives from the law/averages who are still here in the courtroom who weren't selected, I'm going to ask that you give your name and phone number. There's a slight chance you might be called back but

very slim for another trial. You're excused from my courtroom for the balance of your jury term, and the only way you'd have to come is if there was some reason for another court that might need some jurors. I think the chances are slim and you're pretty well assured of not having to come back. Don't come back unless we call you. Thank you very much for being here.

For the record, counsel and the Court agreed to allow the reasons for the challenges to be done privately at the bench, but the court has permitted the challenges of Mr. Donahue, Mr. Forest, Mr. Ferrand, Miss McMillan, Miss Lyons, Miss Burks, and Mr. Schiro to be for cause in view of the Whitherspoon ruling. The other challenges were peremptory.

Do you have some motions you want to...

MR. BLANCHE:

Yes, sir. I just want to articulate the challenge that I have to the selection procedure used by the District Attorney's office for the record.

THE COURT:

All right, sir.

MR. BLANCHE:

First, that there was a systematic exclusion of blacks from the jury. It's been statistically shown that blacks are

less likely to vote for the death penalty than other identifiable segments in our society. Secondly, although I know it was in conformity with the law as it presently exists, we have a Whitherspoon qualified or death qualified jury, and I object specifically to the exclusion of those who voiced a conscientious opposition to the imposition of the death penalty. It deprives him of a cross section of the community and it's (indecipherable word) of his rights to due process clause of the Louisiana and United States Constitution.

THE COURT:

Do you wish to respond?

MR. LEITZ:

No, sir.

THE COURT:

All right. The State has thirteen peremptory challenges. The State can exercise them without any question being asked just as you can exercise thirteen peremptory challenges. Each side tries to pick the juror that they feel will serve their purposes best in the courtroom, and I found that the challenges made by the State, and the State incidentally challenged seven, I believe, that two of the ladies, Miss Burks, Miss Lyons, voiced

complete, total objection to the death penalty and indicated under no circumstances would they render a penalty of death in any case. Under the Whitherspoon ruling the Court has no alternative but to allow a challenge for cause. Unless the Whitherspoon ruling is overturned, I feel that the State's actions and the Court's ruling were within the confines of the existing law at this time. Accordingly, the motions are...I assume you're moving for a mistrial or you're voicing an objection just for the record?

MR. BLANCHE:

I'm objecting to the procedure and I suppose to sort of protect myself, I move for a mistrial.

THE COURT:

The court is going to deny the request for the reason stated. We'll recess until 9:30 tomorrow morning.

(Court recessed until 9:30 A.M. October 25, 1978.)

C E R T I F I C A T E

I, Gwen DeLatte, an OCR, do hereby confirm that the foregoing transcript is a true and correct copy of the matter heard on October 24, 1978, before the Honorable Frank V. Zaccaria, Judge, entitled, "State of Louisiana vs. Benjamin A. Berry", No. 78-2151.

Gwen DeLatte

Gwen DeLatte, OCR

SUPREME COURT OF THE UNITED STATES

BENJAMIN A. BERRY *v.* JOHN T. KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–5446. Decided June 2, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

This is yet another capital case in which defense counsel failed to present *any* mitigation evidence whatsoever during the sentencing phase of a defendant's trial. I believe that, except perhaps in the extraordinary case, counsel's failure even to attempt to give the jury some reason for believing a defendant is not deserving of death denies defendant his Sixth Amendment right to the effective assistance of counsel. And I have yet to see that extraordinary case. I would grant the petition for certiorari and vacate the sentence.